

AD-A243 955

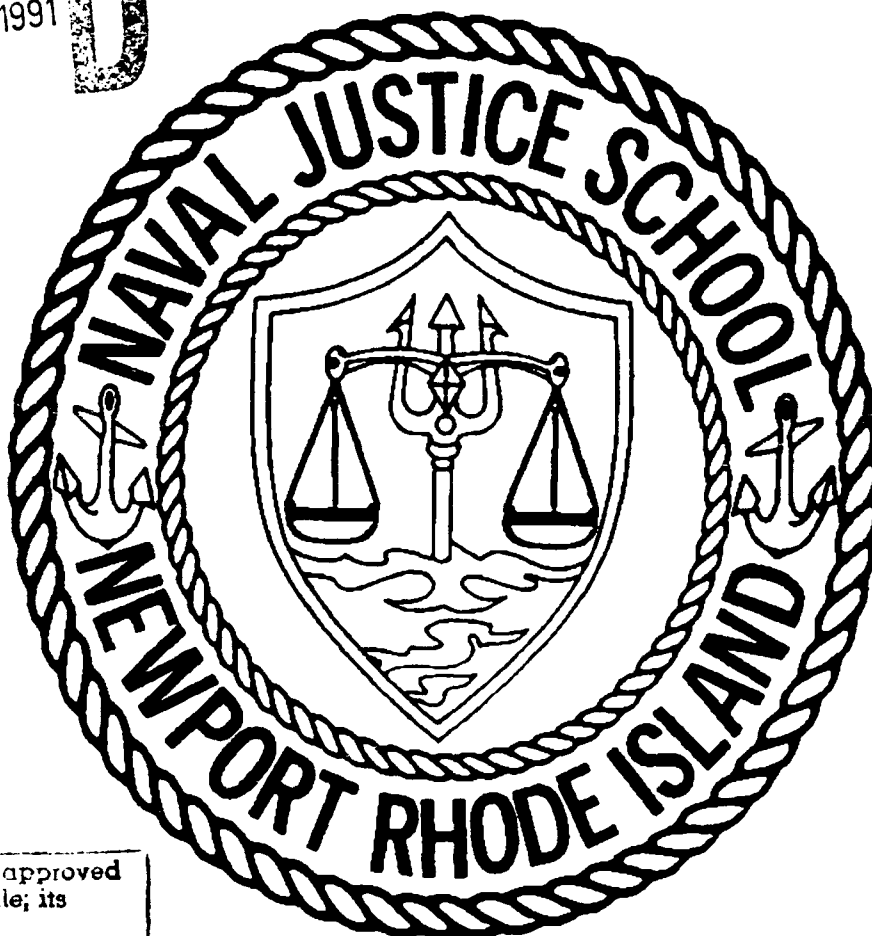


S J A

2

DESKBOOK

DTIC
ELECTE
DEC 30 1991
S D D



This document has been approved
for public release and sale; its
distribution is unlimited.

91 1227 062

91-19189



October 1991

**Best
Available
Copy**

NAVAL JUSTICE SCHOOL
NEWPORT, RHODE ISLAND 02841-5030

Naval Justice School publications are updated periodically to incorporate recent changes in the law. Each edition contains the date of the new edition (month and year). As new editions containing major substantive changes are printed for distribution to students, copies are furnished to the Defense Technical Information Center (DTIC) and the National Technical Information Service (NTIS) for republication and sale. The availability of texts through these agencies lags approximately six months behind the date of the printing at the Naval Justice School. If updated or additional copies of study guides are desired, the DTIC or the NTIS should be contacted directly to obtain the date of the edition available and ordering information. Copies are not available from the Naval Justice School.

Commands not already registered with the DTIC may obtain registration forms and information on ordering publications by writing to:

Defense Technical Information Center
Attention: Code DTIC-FDRA
Cameron Station, Building 5
Alexandria, VA 22304-6145

Individual purchasers may obtain information on ordering publications by writing to:

U.S. Department of Commerce
National Technical Information Service
5285 Port Royal Road
Springfield, VA 22161

An alternative means of obtaining an even wider range of our publications, including Professional Development Program (PDP) modules, is by downloading them from our Electronic Bulletin Board at AUTOVON 948-3990 or commercial (401) 841-3990, 8-N-1, 1200/2400 BAUD.

AD A 243955

MISSING PAGES WIL BE INSERTED AT AN LATER DATE
AS ERRATAS.

DC
VIII - 20

PREFACE

Soon after assuming his position as Judge Advocate General, Rear Admiral John E. Gordon began focusing on a problem which had been around for too long: the absence of a reference deskbook for staff judge advocates. Concerned that SJAs were spending too much time reinventing the wheel, Admiral Gordon made creation of this Deskbook a priority item. Rear Admiral William L. Schachte, Jr., Commander, Naval Legal Service Command, directed me to spearhead this project, in my capacity as head of all Navy judge advocate training.

The first step was collecting the raw material. On 22 April 1991, Admiral Gordon asked all SJAs and NLSO commanding officers to send their collected wisdom to the Naval Justice School. Brigadier General Gerald L. Miller, Staff Judge Advocate to the Commandant of the Marine Corps, sent a similar call for support to his senior and staff judge advocates. The support was overwhelming. When the deluge ended in late July, my staff had an in-box that was more than three feet high, chock full of useful information.

This Deskbook is a distillation of those materials. My staff was challenged in the distillation process to make peace between several competing *interests*: to assemble a reference manual for field use which could double as the text for our resident SJA courses; to present information which would be valuable to Navy SJAs yet be of use to our Marine partners; to be responsive to the unique needs of both senior and new SJAs; to give appropriate treatment to issues ashore and afloat, overseas and at home, etc. The result is a Deskbook intended to *aid* rather than *bind* the SJA. These materials reflect our practice. They are intended neither to supplant, nor add to, departmental policy guidance. Others make the word; we spread it.

We hope the Deskbook will become "the bible" for the fledgling SJA and a reference to validate the gut reactions of the more experienced. The SJA should be able to turn to a subject area, become somewhat knowledgeable in the area quickly, and know where to look for additional guidance. Many may find it suitable as a turnover item which will be embellished with appropriate topics of local practice. To that end, the Deskbook was published in loose-leaf to make adding material easier.

I thank the judge advocates who contributed to this project. We received materials from every Navy and Marine Corps legal office around the globe. Although obviously not everything could find its way into the Deskbook, rest assured that we value these materials. My instructors will use your contributions to give a practical spin to their classes. Some submissions will be incorporated into other Naval Justice

School publications such as the Aids to Practice, the Environmental Law Deskbook, and a pending publication on contract law. Your work will keep us in touch with actual practice and keep us from becoming an ivory tower of academia.

This Deskbook is far from perfect. The ever-changing rules which guide our practice dictate that we keep this reference up to date. Major changes are in the works, for example, in the Standards of Conduct arena. Rather than holding up publication of this Deskbook in anticipation of new Office of Government Ethics guidance, we will make a revision and put it on the Naval Justice School electronic bulletin board. SJAs need only download, print, and add to their binders. In a larger sense, we publish the Deskbook with the hope that *you*, as the contributors who made it possible, will review it critically and let us know how we can make it more responsive to your needs as an SJA.

Finally, I want to thank Major Scott Thomas, USMC, the author and editor of this Deskbook. In April, Major Thomas volunteered to undertake this project - one that has defied completion for nearly a decade. He imposed upon himself the nearly impossible deadline of completion this fiscal year. That he was successful is no surprise - I know few officers who are his equal. I should also add that his principle assistant for the compilation process was MS3 Mark Blask, assigned temporarily to NJS awaiting the next Legalman Conversion course. I do not know where he will be assigned upon graduation, but I know that one of our offices will be indeed fortunate. The JAGC Corps and the Judge Advocate Division owe Major Thomas and Petty Officer Blask a considerable debt.

A. R. PHILPOTT
Captain, JAGC, U.S. Navy
Commanding Officer
Naval Justice School

TABLE OF CONTENTS

Chapter		Page
PART I.	INTERNATIONAL LAW	
11	SOURCES OF INTERNATIONAL LAW	I-1
12	LAW OF THE SEA	I-4
13	LAW OF ARMED CONFLICT	I-29
14	SECURITY ASSISTANCE	I-74
15	HUMANITARIAN AND CIVIC ASSISTANCE	I-83
PART II.	OPERATIONAL LAW	
21	RULES OF ENGAGEMENT	II-1
22	DRUG INTERDICTION	II-7
23	INTELLIGENCE OPERATIONS AND OVERSIGHT	II-20
24	TERRORISM	II-47
25	PERSONNEL AND INFORMATION SECURITY	II-56
26	SPECIAL INCIDENT REPORTING	II-71
27	AUTHORITIES FOR CRISIS ACTION	II-84
PART III.	OVERSEAS ISSUES	
31	FOREIGN CRIMINAL JURISDICTION	III-1
32	LIBERTY RISK	III-7
33	PRIVATE INTERNATIONAL LAW	III-9
34	FOREIGN CLAIMS	III-13
35	COMMAND SPONSORSHIP	III-21
35	CUSTOMS	III-29
36	IMMIGRATION AND NATURALIZATION	III-41
PART IV.	INSTALLATION LAW	
41	PHYSICAL SECURITY	IV-1
42	RELATIONS WITH CIVILIAN AUTHORITIES	IV-28
43	FREEDOM OF EXPRESSION	IV-57
44	CIVILIAN PERSONNEL LAW	IV-75
45	MISCELLANEOUS ISSUES	IV-88

PART V. MILITARY JUSTICE

51	GENERAL PRELIMINARY MATTERS	V-1
52	DISPOSITION OF MINOR OFFENSES	V-27
53	PRETRIAL MATTERS	V-68
54	CONVENING COURTS-MARTIAL	V-95
55	RECURRING PROCEDURAL ISSUES AND MOTIONS	V-118
56	RECURRING TRIAL ISSUES	V-149
57	POST-TRIAL REVIEW AND APPELLATE PROCEDURE	V-181

PART VI. ADMINISTRATIVE LAW

61	ADMINISTRATIVE FACT FINDING BODIES	VI-1
62	LINE OF DUTY/MISCONDUCT DETERMINATIONS	VI-59
63	FREEDOM OF INFORMATION ACT (FOIA)	VI-73
64	STANDARDS OF CONDUCT AND GOVERNMENT ETHICS	VI-86
65	CLAIMS	VI-122

PART VII. LEGAL ASSISTANCE

71	GENERAL	VII-1
72	FAMILY LAW	VII-9
73	TAXATION	VII-23
74	SERVICEMEMBER PROTECTIONS	VII-31
75	CONSUMER LAW	VII-36
76	PRACTICE AIDS	VII-56

PART VIII. ADMINISTRATIVE SEPARATIONS AND PERSONNEL LAW

81	ENLISTED SEPARATIONS	VIII-1
82	OFFICER SEPARATIONS	VIII-80
83	DETACHMENTS FOR CAUSE	VIII-103
84	DISABILITY PROCESSING	VIII-110
85	HIV+ ISSUES	VIII-115
86	TRUSTEE APPOINTMENTS	VIII-121

PART IX.**GENERAL SJA TOPICS**

91	TOTAL QUALITY LEADERSHIP	IX-1
92	ETHICS FOR THE SJA	IX-12
93	EFFECTIVE WRITING	IX-26

APPENDIX

ACRONYMS	A-1
----------	-----

ACKNOWLEDGMENTS

Any attempt to list the judge advocates who generously contributed their work to this Deskbook would be incomplete. In most cases, I received a box of materials with a cover letter signed by the commanding officer or SJA; the documents inside did not reveal their authorship. I suspect an accurate list would approach the size of the Navy and Marine JAG directory. I thank those unknown Navy and Marine judge advocates who participated and apologize for my failure to accord them due credit by name.

I can and must acknowledge the support of a number of people at the Naval Justice School without whom this book would not be in your hands.

For technical and wordprocessing support, I am grateful to: PO3 M. A. Blask, USN; Ms. K. Jameson; CWO4 R. C. Kolstee, USN; Ensign I. C. Kurzweil, USN; Mr. M. Martin; Mr. I. J. Reilly; Ms. A. Silvia; LT J. E. Sawyer, USN; Ms. C. Smith; and Ms. R. Texeira.

For their quick yet thorough review, I am grateful to: LCDR W. Aseltine, JAGC, USN; LCDR R. W. Bagley, JAGC, USN; LCDR S. W. Bannow, JAGC, USN; MAJ J. J. Canham, Jr., USMC; CDR J. E. Crowley USCG; LCDR H. H. Dronberger, JAGC, USN; CAPT M. D. Finch, JAGC, USN; LCDR (sel) M. A. Flynn, JAGC, USN; LT W. M. Frederick, JAGC, USN; LCDR T. C. Ganzel, JAGC, USNR; COL D. C. Hague USMC; CDR W. C. Hewson, JAGC, USN; CDR P. W. Kelley, JAGC, USN; LCDR M. G. Laverdiere, JAGC, USN; Lt J. P. Luster, JAGC, USN; LTJG G. M. Major, USN; MAJ D. J. Markosky USMC; LCDR R. Pedrozo, JAGC, USN; LTCOL E. F. Pesik USMC; CAPT A. R. Philpott, JAGC, USN; CDR (sel) F. V. Russo, JAGC, USN; LCDR W. T. Smitherman, JAGC, USN; Mr. T. Suich; LCDR H. B. Thompson, JAGC, USN; and Ms. D. Turner.

Very respectfully,

SJA Deskbook Editor
Civil Law Department
Naval Justice School

PART I. INTERNATIONAL LAW

CHAPTER 11

SOURCES OF INTERNATIONAL LAW

1101 **INTERNATIONAL LAW.** International law may be defined as that body of rules that nations consider binding in their relations with one another. International law derives from the practice of nations in the international arena and from international agreements. Though ever-changing, international law provides stability in international relations and an expectation that certain acts or omissions will effect predictable consequences. Consequently, failure to comply with international law ordinarily involves greater political and economic costs than does observance. Nations comply with international law because it is in their interest to do so.

1102 **CUSTOMARY INTERNATIONAL LAW.** The general and consistent practice among nations with respect to a particular subject, which over time is accepted by them generally as a legal obligation, is known as customary international law. Customary international law is the principal source of international law and is binding upon all nations. Occasional violations do not substantially affect the validity of a rule of law, provided routine compliance, observance, and enforcement continue to be the norm.

1103 **INTERNATIONAL AGREEMENTS.** An international agreement is a commitment entered into by two or more nations which reflects their intention to be bound by its terms in their relations with one another. International agreements, whether bilateral treaties, executive agreements, or multilateral conventions, bind only those nations that are party to them or that may otherwise consent to be bound by them. Moreover, rules established through the treaty process are binding only to the extent required by the terms of the treaty itself as limited by the reservations, if any, that have accompanied its ratification or adherence by individual nations. Conversely, to the extent that such rules over time come to represent a general consensus among nations of their obligatory nature, they are binding upon party and non-party nations alike.

A. International Agreement References

1. DoD Directive 5530.3 of 11 June 1987
2. JAG Manual § 1003

3. JCS MOP 179
4. SECNAVINST 5710.25
5. OPNAVINST 5710.24
6. OPNAVINST 5710.25

B. International Agreement Defined. An international agreement is any oral or written agreement with a foreign government, its agencies, instrumentalities, or political subdivisions, or with an international organization, that: is agreed to by DoD personnel; signifies the intention of its parties to be bound; and is denominated as an international agreement or any other name connoting a similar legal consequence. Accordingly, international agreements do NOT include: contracts made under the Federal Acquisition Regulations (FAR); NATO Standardization Agreements; certain real estate leases; agreements solely to establish administrative procedures; and other agreements specified in JAG Manual § 1003.

C. Negotiation of Agreements. The United States concludes international agreements in various ways. Navy and Marine Corps members may conclude these agreements only when specifically authorized. For matters under DoN cognizance, members seek authorization to negotiate and conclude an international agreement from CNO, the Chief of Naval Research, or CMC, as appropriate. For matters that concern operational command of joint forces, such authorization should be sought from the Chairman, JCS. Negotiations toward the formation of any international agreement are not permitted pending receipt of such authorization. Once authorized to negotiate, the cognizant U.S. representative must not deviate from the letter of the authorization. The procedures for requesting negotiating authority, concluding agreements, and ultimate forwarding are discussed in JAG Manual § 1003.

D. Practice Points. Make no unilateral commitments to any foreign government or international organization on any subject. Report every unsolicited proposal made by a foreign government or international organization on any subject to proper authority through appropriate channels. Bring the need for international agreements on any subject matter to the attention of JAG and CNO or CMC.

E. International Agreements in the Law of Armed Conflict. Principal among the international agreements reflecting the development and codification of the law of armed conflict are the Hague Regulations of 1907, the Gas Protocol of 1925, the Geneva Conventions of 1949 for the Protection of War Victims, the 1954 Hague Cultural Property Convention, the Biological Weapons Convention of 1972, and the Conventional Weapons Convention of 1980. Whereas the 1949 Geneva Conventions and the 1977 Protocols Additional thereto address, for the most part, the protection of victims of war, the Hague Regulations, the Geneva Gas Protocol, Hague Cultural Property Convention, Biological Weapons Convention and the Conventional

Weapons Convention are concerned, primarily, with controlling the means and methods of warfare. The most significant of these agreements are discussed throughout the topics in the law of armed conflict. SJAs interested in the primary references should consult the Annotated Supplement to NWP 9 (Rev. A)/FMFM 1-10, DA Pamphlet 27-24, and AFP 110-20.

1104 **ADHERENCE BY THE UNITED STATES.** Under the U.S.
Constitution, our treaties with other nations constitute a part of the "supreme law of the land" with a force equal to that of law enacted by the Congress. Moreover, the Supreme Court has consistently ruled that where no treaty, law, or other judicial precedent controls, customary international law and the common law are fundamental elements of U.S. national law. Article 0705, U.S. Navy Regulations, 1990, provides that: "At all times, commanders shall observe, and require their commands to observe, the principles of international law. Where necessary to fulfill this responsibility, a departure from other provisions of Navy Regulations is authorized." That requirement has been further implemented by CNO and CMC in OPNAVINST 3300.52 and MCO 3300.3. Specific guidance regarding the law of armed conflict is provided in SECNAVINST 3300.1A.

CHAPTER 12

LAW OF THE SEA

LEGAL DIVISIONS OF THE OCEANS AND AIRSPACE

1201 **MARITIME BASELINES.** The territorial sea and all other maritime zones are measured from baselines. To calculate the seaward reach of claimed maritime zones, one must understand how baselines are drawn.

A. Low-Water Line. Unless other special rules apply, the baseline from which maritime claims of a nation are measured is the low-water line along the coast as marked on the nation's official large-scale charts.

B. Straight Baselines. Where a coastal or island nation's irregular coastline would be impracticable to use the low-water line, the nation may instead employ straight baselines. Generally, straight baselines must not depart from the general direction of the coast and the sea areas they enclose must be closely linked to the land domain. A list of nations which use straight baselines appears in table ST1-3 of NWP-9 (Rev. A).

C. Bays and Gulfs. Many bodies of water called "bays" in the geographic sense are not bays for purposes of international law. For baseline purposes, a "bay" is a well-marked indentation in the coastline of such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. The water area of a bay must be greater than that of a semicircle whose diameter is the length of the line drawn across the mouth. Where the indentation has more than one mouth due to the presence of islands, the diameter of the test semicircle is the sum of the lines across the various mouths. The baseline across the mouth of a bay may not exceed 24 nautical miles (NM) in length. Where the mouth is wider than 24 NM, a baseline of 24 NM may be drawn within the bay so as to enclose the maximum water area. Where the semicircle test has been met, and a closure line of 24 NM or less may be drawn, the body of water is a "bay" in the legal sense.

D. Historic Bays. "Historic bays" are not determined by the semicircle and 24 NM closure line rules. To meet the international standard for establishing a claim to a historic bay, a nation must demonstrate its open, effective, long term, and continuous exercise of authority over the bay, coupled with acquiescence by foreign nations in the exercise of that authority. The United States has taken the position that an actual showing of acquiescence by foreign nations in such a claim is

required, not the mere absence of opposition.

E. Other Features. Where a river flows directly into the sea, the baseline is a straight line across the mouth of the river between points on the low-water line of its banks. The low-water line of a reef may be used as the baseline for islands situated on atolls or having fringing reefs. Harbor works are structures such as jetties and breakwaters erected along the coast at inlets or rivers for protective purposes or for enclosing sea areas adjacent to the coast to provide anchorage and shelter. The outermost permanent harbor works which form an integral part of the harbor system are regarded as forming part of the coast for baseline purposes.

1202 **NATIONAL WATERS.** National waters includes internal waters, territorial seas, and archipelagic waters. These national waters are subject to the territorial sovereignty of coastal and island nations, with certain navigational rights reserved to the international community.

A. Internal Waters. Internal waters are landward of the baseline from which the territorial sea is measured. Lakes, rivers, some bays, harbors, some canals, and lagoons are examples of internal waters. From the standpoint of international law, internal waters have the same legal character as the land itself. Unless in distress, ships and aircraft may not enter or overfly internal waters without the permission of the coastal or island nation.

B. Territorial Seas. The territorial sea is a belt of ocean which is measured seaward from the baseline of the coastal or island nation and subject to its sovereignty. The U.S. claims a 12 NM territorial sea and recognizes territorial sea claims of other nations up to a maximum breadth of 12 NM.

1. Islands, Rocks, and Low-Tide Elevations. Each island has its own territorial sea and, like the mainland, has a baseline from which it is calculated. An island is defined as a naturally formed area of land, surrounded by water, which is above water at high tide. Rocks are islands which cannot sustain human habitation or economic life. Provided they remain above water at high tide, they too possess a territorial sea. Land which is above water at low tide but submerged at high tide, if situated wholly or partly within the territorial sea, may be used for territorial sea purposes as though it were an island.

2. Artificial Islands, Off-Shore Installations, and Roadsteads. Artificial islands and off-shore installations have no territorial sea of their own. Roadsteads normally used for the loading, unloading, and anchoring of ships, and which would otherwise be situated wholly or partly beyond the outer limits of the territorial sea, are included within the territorial sea. Roadsteads included within the territorial sea must be clearly marked on charts by the coastal or island nation.

C. Archipelagic Waters. An archipelagic nation is one wholly comprised of one or more groups of islands. Such nations may draw straight archipelagic baselines joining the outer-most points of their islands provided that the ratio of water to land within the baselines is between 1 to 1 and 9 to 1. The waters enclosed within the archipelagic baselines are called archipelagic waters. The archipelagic baselines are also the baselines from which the archipelagic nation's territorial sea, contiguous zone, and exclusive economic zone are also measured seaward from these baselines.

1. U.S. Recognition. The U.S. recognizes the right of an archipelagic nation to establish archipelagic baselines enclosing archipelagic waters provided the baselines are drawn in conformity with the 1982 LOS Convention and that the U.S. is accorded navigation and overflight rights and freedoms under international law in the enclosed archipelagic and adjacent waters.

2. Archipelagic Sea Lanes. Archipelagic nations may designate archipelagic sea lanes through their archipelagic waters suitable for continuous and expeditious passage of ships and aircraft. All normal routes used for international navigation and overflight are to be included. If the archipelagic nation does not designate such sea lanes, the right of archipelagic sea lanes passage may nonetheless be exercised by all nations through routes normally used for international navigation and overflight.

1203 **INTERNATIONAL WATERS.** International waters include all ocean areas not subject to the territorial sovereignty of any nation. All waters seaward of the territorial sea are international waters in which the high seas freedoms of navigation and overflight are preserved to the international community. International waters include contiguous zones, exclusive economic zones, and high seas.

A. Contiguous Zones. A contiguous zone is an area extending seaward from the territorial sea in which the coastal or island nation may exercise the control necessary to prevent or punish infringement of its customs, fiscal, immigration, and sanitary laws and regulations that occur within its territory or territorial sea (but not for so-called security purposes). The U.S. claims a contiguous zone extending 12 NM from the base-lines used to measure the territorial sea. The U.S. will respect, however, contiguous zones extending up to 24 NM provided the coastal or island nation recognizes U.S. rights in the zone consistent with the provisions of the 1982 LOS Convention.

B. Exclusive Economic Zones. Exclusive economic zones (EEZs) are resource-related zones adjacent to the coast and extending beyond the territorial sea. As the name suggests, its central purpose is economic. The United States established a 200 NM EEZ by Presidential Proclamation on 10 March 1983. The U.S. recognizes the sovereign rights of a coastal or island nation to prescribe and enforce its laws in

the exclusive economic zone, extending up to 200 NM from the baselines used to measure the territorial sea, for the purposes of exploration, exploitation, management, and conservation of the natural resources of the waters, seabed, and subsoil of the zone, as well as for the production of energy from the water, currents, and winds. The coastal or island nation may exercise jurisdiction in the zone over the establishment and use of artificial islands, installations, and structures having economic purposes; over marine scientific research (with reasonable limitations); and over some aspects of marine environmental protection (primarily implementation of international vessel-source pollution control standards). All nations, however, enjoy the right in any EEZ to exercise the traditional high seas freedoms of navigation and overflight, of the laying of submarine cables and pipelines, and of all other traditional high seas uses by ships and aircraft which are not resource related.

C. High Seas. The high seas include all parts of the ocean seaward of the exclusive economic zone. When a coastal or island nation has not proclaimed an exclusive economic zone, the high seas begin at the seaward edge of the territorial sea.

D. Security Zones. Some coastal nations have claimed the right to establish military security zones, beyond the territorial sea, of varying breadth in which they purport to regulate the activities of warships and military aircraft of other nations by such restrictions as prior notification or authorization for entry, limits on the number of foreign ships or aircraft present at any given time, prohibitions on various operational activities, or complete exclusion. These restrictions are not recognized under international law. Accordingly, the U.S. does not recognize the peacetime validity of any claimed security or military zone seaward of the territorial sea which purports to restrict or regulate the high seas freedoms of navigation and overflight.

1204 **CONTINENTAL SHELF**. For international law purposes, the continental shelf of a coastal or island nation consists of the seabed and subsoil of the submarine areas that extend beyond its territorial sea to the outer edge of the continental margin, or to a distance of 200 NM from the baseline used to measure the territorial sea where the continental margin does not extend to that distance. The continental shelf may not extend beyond 350 NM from the baseline of the territorial sea or 100 NM from the 2,500 meter isobath, whichever is greater. Although the coastal or island nation exercises sovereign rights over the continental shelf for purposes of exploring and exploiting its natural resources, the legal status of the superjacent water is not affected. Moreover, all nations have the right to lay submarine cables and pipelines on the continental shelf.

1205 **SAFETY ZONES**. Coastal and island nations may establish safety zones to protect artificial islands, installations, and structures located in their internal waters, archipelagic waters, territorial seas and EEZs, and on their continental shelves. In the case of artificial islands, installations, and structures

located in the EEZ or on the continental shelf beyond the territorial sea, safety zones may not extend beyond 500 meters from the outer edges of the facility, except as authorized by generally accepted international standards.

1206 **AIRSPACE.** Under international law, airspace is classified as either national airspace (that over the land, internal waters, archipelagic waters, and territorial seas of a nation) or international airspace (that over contiguous zones, exclusive economic zones, the high seas, and territory not subject to the sovereignty of any nation). Subject to a right of overflight of international straits and archipelagic sea lanes, each nation has complete and exclusive sovereignty over its national airspace. Except as they may have otherwise consented through treaties or other international agreements, the aircraft of all nations are free to operate in international airspace without interference by other nations.

INTERNATIONAL STATUS AND NAVIGATION OF WARSHIPS

1207 **STATUS OF WARSHIPS**

A. Warship Defined. International law defines a warship as a ship belonging to the armed forces of a nation bearing the external markings distinguishing the character and nationality of such ships, under the command of an officer duly commissioned by the government of that nation and whose name appears in the appropriate service list of officers, and manned by a crew which is under regular armed forces discipline. In the U.S. Navy, those ships designated "USS" are "warships" as defined by international law. U.S. Coast Guard vessels designated "USCGC" are also "warships" under international law.

B. International Status. A warship enjoys sovereign immunity from interference by the authorities of nations other than the flag nation. Police and port authorities may board a warship only with the permission of the commanding officer. A warship cannot be required to consent to an onboard search or inspection, nor may it be required to fly the flag of the host nation. Although warships are required to comply with coastal nation traffic control, sewage, health, and quarantine restrictions instituted in conformance with the 1982 LOS Convention, a failure of compliance is subject only to diplomatic complaint or to coastal nation orders to leave its territorial waters immediately. Moreover, warships: are immune from arrest and seizure, both in national and international waters; are exempt from foreign taxes and regulation; and exercise exclusive control over all passengers and crew with regard to acts performed on board. Nuclear powered warships and conventionally powered warships enjoy identical international legal status.

C. Auxiliaries. Auxiliaries are vessels, other than warships, that are owned by or under the exclusive control of the armed forces. Because they are state owned or operated and used for the time being only on government noncommercial service, auxiliaries enjoy sovereign immunity. This means that, like warships, they

are immune from arrest and search, whether in national or international waters. They are also exempt from foreign taxes and regulation, and exercise exclusive control over all passengers and crew with respect to acts performed onboard. U.S. auxiliaries include all vessels which comprise the Military Sealift Command (MSC) Force. The MSC Force includes: (1) United States Naval Ships (USNS) (i.e., U.S. owned vessels or those under bareboat charter, and assigned to MSC); (2) the National Defense Reserve Fleet and the Ready Reserve Force (RRF) (when activated and assigned to MSC); (3) privately owned vessels under time charter assigned to the Afloat Prepositioned Force (APF); and those vessels chartered by MSC for a period of time or for a specific voyage or voyages. The United States claims full rights of sovereign immunity for all USNS, APF, NRDF and RRF vessels. As a matter of policy, however, the U.S. claims only freedom from arrest and taxation for those MSC Force time and voyage charters not included in the APF.

1208 NAVIGATION IN NATIONAL WATERS

A. Internal Waters. Nations exercise the same jurisdiction and control over their internal waters and superjacent airspace as they do over their land territory. Entering a port ordinarily involves navigation in internal waters. Because entering internal waters is legally equivalent to entering the land territory of another nation, that nation's permission is required. While many nations grant foreign merchant vessels standing permission to enter internal waters to facilitate commerce, warships, auxiliaries, and all aircraft, require specific and advance entry permission, unless otherwise permitted under bilateral or multilateral arrangements.

B. The Territorial Sea. Navigation by foreign vessels In the territorial sea is regulated by the regimes of innocent passage, assistance entry, transit passage, and archipelagic sea lanes passage.

C. Innocent Passage. International law provides that ships (but NOT aircraft) of all nations enjoy the right of innocent passage for the purpose of continuous and expeditious traversing of the territorial sea or for proceeding to or from internal waters. Innocent passage includes stopping and anchoring, but only insofar as incidental to ordinary navigation, or as rendered necessary by force majeure or by distress. Foreign ships, including warships, exercising the right of innocent passage are required to comply with the laws and regulations enacted by the coastal or island nation in conformity with established principles of international law and, in particular, with such laws and regulations relating to the safety of navigation. Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal or island nation. The coastal or island nation may take affirmative actions in its territorial sea to prevent passage that is not innocent, including, where necessary, the use of force.

1. Inconsistent Activities. Military activities considered to be prejudicial to the peace, good order, and security, and therefore inconsistent with

innocent passage, include:

- a. Any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal nation;
- b. Any exercise or practice with any weapons;
- c. The launching, landing, or taking on board of any aircraft or of any military device
- d. Intelligence collection activities detrimental to the security of that coastal nation; and
- e. Any research or survey activities.

2. Permitted Restrictions. For purposes such as resource conservation, environmental protection, and navigational safety, a coastal or island nation may establish certain restrictions upon the right of innocent passage of foreign vessels. For example, nations may, where navigational safety dictates, require foreign ships exercising the right of innocent passage to use designated sea lanes and traffic separation schemes. Such restrictions upon the right of innocent passage through the territorial sea are not prohibited by international law, provided that they:

- a. Are reasonable and necessary;
- b. do not have the practical effect of denying or impairing the right of innocent passage; and
- c. do not discriminate in form or in fact against the ships of any nation or those carrying cargoes to, from, or on behalf of any nation.

3. Temporary Suspension. A nation may suspend innocent passage temporarily in specified areas of its territorial sea, when essential to its security. Such a suspension must be preceded by a published notice to the international community and may not discriminate in form or in fact between foreign ships.

4. Warships. All warships, including submarines, enjoy the right of innocent passage on an unimpeded and unannounced basis. Submarines, however, are required to navigate on the surface and to show their flag when passing through foreign territorial seas. If a warship does not comply with national regulations that conform to established principles of international law and disregards a request for compliance, the nation may require the warship immediately to leave the territorial

sea.

D. Assistance Entry. All ship and aircraft commanders have an obligation to assist those in danger of being lost at sea. This long recognized duty of mariners permits assistance entry into the territorial sea by ships or, under certain circumstances, aircraft without the nation's permission to engage in bona fide efforts to render emergency assistance to those in danger or distress at sea. This right applies only when the location of the danger or distress is reasonably well known. It does not extend to entering the territorial sea or airspace to conduct a search.

E. Transit Passage. Under international law, the ships and aircraft of all nations, including warships and military aircraft, enjoy the right of unimpeded transit passage through international straits overlapped by territorial seas. Submarines are free to transit international straits submerged, since that is their normal mode of operation, and that surface warships may transit in a manner consistent with sound navigational practices and the security of the force, including formation steaming and the launching and recovery of aircraft. All transiting ships and aircraft must proceed without delay; must refrain from the threat or the use of force against the sovereignty, territorial integrity, or political independence of nations bordering the strait; and must otherwise refrain from any activities other than those incident to their normal modes of continuous and expeditious transit.

1. International Straits Overlapped by Territorial Seas. Straits used for international navigation through the territorial sea between one part of the the high seas or an exclusive economic zone (EEZ) and another part of the high seas or an EEZ are subject to the legal regime of transit passage.

a. Suspension. Transit passage through international straits cannot be suspended by the coastal or island nation for any purpose during peacetime. This principle of international law also applies to transiting ships (including warships) of nations at peace with the bordering coastal or island nation but involved in armed conflict with another nation.

b. Traffic Schemes. Coastal or island nations bordering international straits overlapped by territorial seas may designate sea lanes and prescribe traffic separation schemes to promote navigational safety. Sea lanes and separation schemes must be approved by the competent international organization per generally accepted international standards. Ships in transit must respect properly designated sea lanes and traffic separation schemes.

2. Straights Between the EEZ and the Territorial Sea. T h e regime of innocent passage, rather than transit passage, applies in straits used for international navigation that connect a part of the high seas or an EEZ with the territorial sea of a coastal or island nation. Nations may not suspend innocent passage through such straits.

3. International Straits Not Completely Overlapped by Territorial Seas. Ships and aircraft transiting through or above straits used for international navigation which are not completely overlapped by territorial seas and through which there is a high seas or EEZ corridor suitable for such navigation, enjoy the high seas freedoms of navigation and overflight while operating in and over such a corridor. So long as they remain beyond the territorial sea, all ships and aircraft of all nations have the unencumbered right to navigate through and over such waters subject only to due regard for the right of others to do so as well. If that corridor unduly restricts navigation, the doctrine of transit passage applies.

F. Archipelagic Sea Lanes Passage. Archipelagic sea lanes passage is defined under international law as the exercise of the freedom of navigation and overflight for the sole purpose of continuous and expeditious transit through archipelagic waters, in the normal modes of operation, by the ships and aircraft involved. All ships and aircraft, including warships and military aircraft, enjoy the right of archipelagic sea lane passage while transiting through, under, or over the waters of archipelagos and adjacent territorial seas via designated archipelagic sea lanes. Archipelagic sea lanes include all routes normally used for international navigation and overflight, regardless of whether designated by the archipelagic nation. Each sea lane is defined by a continuous line from the point of entry into the archipelago to the point of exit. Ships and aircraft in archipelagic sea lanes passage are required to remain within 25 nautical miles to either side of the axis line and must approach no closer to the coastline than 10 percent of the distance between the nearest islands. Submarines may transit while submerged; surface warships may carry out those activities normally undertaken during passage through such waters, including activities necessary to their security, such as formation steaming and the launching and recovery of aircraft. The right of archipelagic sea lanes passage cannot be impeded, or suspended by the archipelagic nation for any reason. Outside of archipelagic sea lanes, all surface ships, including warships, enjoy the more limited right of innocent passage throughout archipelagic waters just as they do in the territorial sea as discussed above.

1209 NAVIGATION IN AND OVERFLIGHT OF INTERNATIONAL WATERS

A. The Contiguous Zone. The contiguous zone is comprised of international waters in and over which the ships and aircraft, including warships and military aircraft, of all nations enjoy the high seas freedoms of navigation and overflight discussed in subparagraph C below. Although the coastal nation may exercise the control necessary in those waters to prevent and punish infringement of its customs, fiscal, immigration, and sanitary laws that may occur within its territory (including its territorial sea), it cannot otherwise interfere with international navigation and overflight in and above the contiguous zone.

B. The Exclusive Economic Zone (EEZ). The coastal nation's jurisdiction

and control over the EEZ are limited to matters concerning the exploration, exploitation, management, and conservation of the resources of those international waters. The coastal or island nation may also exercise in the zone jurisdiction over the establishment and use of artificial islands, installations, and structures having economic purposes; over marine scientific research (with reasonable limitations); and over some aspects of marine environmental protection. Accordingly, the coastal or island nation cannot unduly restrict or impede the exercise of the freedoms of navigation in and overflight of the exclusive economic zone. Since all ships and aircraft, including warships and military aircraft, enjoy the high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms in and over those waters, the existence of an EEZ in an area of naval operations need not, of itself, be of operational concern to the naval commander.

C. The High Seas. All ships and aircraft, including warships and military aircraft, enjoy complete freedom of movement and operation on and over the high seas. For warships, this includes task force maneuvering, flight operations, military exercises, surveillance, intelligence gathering activities, and ordnance testing and firing. All nations also enjoy the right to lay submarine cables and pipelines on the bed of the high seas as well as on the continental shelf beyond the territorial sea, with coastal or island nation approval for the course of pipelines on the continental shelf. All of these activities must be conducted with due regard for the rights of other nations and the safe conduct and operation of other ships and aircraft.

1. Closure or Warning Areas. Any nation may declare a temporary closure or warning area on the high seas to advise other nations of the conduct of activities that, although lawful, are hazardous to navigation and/or overflight. The U.S. and other nations routinely declare such areas for missile testing, gunnery exercises, space vehicle recovery operations, and other purposes entailing some danger to other lawful uses of the high seas by others. Notice of the establishment of such areas must be promulgated in advance, usually in the form of a Notice to Mariners (NOTMAR) and/or a Notice to Airmen (NOTAM). Ships and aircraft of other nations are not required to remain outside a declared closure or warning area, but are obliged to refrain from interfering with activities therein. Consequently, U.S. ships and aircraft may operate in a closure area declared by a foreign nation, collect intelligence and observe the activities involved, subject to the requirement of due regard for the rights of the declaring nation to use the high seas for such lawful purposes, as may the ships and aircraft of other nations in a U.S. declared closure area.

2. Declared Security and Defense Zones. International law does not recognize the right of any nation to restrict the navigation and overflight of foreign warships and military aircraft beyond its territorial sea. Although several coastal nations, including North Korea and Vietnam, have asserted claims that purport to prohibit warships and military aircraft from operating in so-called security zones extending beyond the territorial sea, such claims have no basis in international law

in time of peace, and are not recognized by the United States.

3. Wartime Defensive Measures. The U.N. Charter and general principles of international law recognize that a nation may exercise measures of individual and collective self-defense against an imminent threat of armed attack or an actual attack directed at that nation or at the regional defense organization of which it is a member. Those measures may include the establishment of "defensive sea areas" or "maritime control areas" in which the threatened nation seeks to enforce some degree of control over foreign entry into its territory. Historically, the establishment of such areas extending beyond the territorial sea has been restricted to periods of war or to declared national emergency involving the outbreak of hostilities. International law does not determine the geographic limits of such areas or the degree of control that a coastal nation may exercise over them, beyond laying down the general requirement of reasonableness in relation to the needs of national security and defense.

D. Polar Regions

1. Arctic Region. The U.S. considers that the waters, ice pack, and airspace of the Arctic region beyond the lawfully claimed territorial seas of littoral nations have international status and are open to navigation by the ships and aircraft of all nations. Although several nations, including Canada and the U.S.S.R., have, at times, attempted to claim sovereignty over the Arctic on the basis of discovery, historic use, contiguity (proximity), or the so-called "sector" theory, those claims are not recognized in international law.

2. Antarctic Region. A number of nations have asserted conflicting and often overlapping claims to portions of Antarctica. These claims are premised variously on discovery, contiguity, occupation and, in some cases, the "sector" theory. The U.S. does not recognize the validity of the claims of other nations to any portion of the Antarctic area. The U.S. is a party to the Antarctic Treaty of 1959. Designed to encourage the scientific exploration of the continent and to foster research and experiments in Antarctica without regard to conflicting assertions of territorial sovereignty, the 1959 accord provides that no activity in the area undertaken while the treaty is in force will constitute a basis for asserting, supporting, or denying such claims. The treaty also provides that Antarctica "shall be used for peaceful purposes only," and that "any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons" shall be prohibited. The treaty does not, however, affect in any way the high seas freedoms of navigation and overflight in the Antarctic region. Antarctica has no territorial sea or territorial airspace.

E. Nuclear Free Zones. The 1968 Nuclear Weapons Non-Proliferation Treaty, to which the United States is a party, acknowledges the right of groups of nations to conclude regional treaties establishing nuclear free zones. Such treaties

or their provisions are binding only on parties to them or to protocols incorporating those provisions. To the extent that the rights and freedoms of other nations, including the high seas freedoms of navigation and overflight, are not infringed upon, such treaties are not inconsistent with international law. The 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco) is an example of a nuclear free zone arrangement that is fully consistent with international law, as evidenced by U.S. ratification of its two Protocols. This does not affect the exercise by the U.S. of navigational rights and freedoms within waters covered by the Treaty of Tlatelolco.

1210 EXERCISE AND ASSERTION OF NAVIGATION AND OVERFLIGHT RIGHTS AND FREEDOMS

A. Policy Statement. The United States has not, and in all likelihood will not, ratify the 1982 U.N Convention on the Law of the Sea (UNCLOS III), in part because of provisions concerning seabed mining (Part XI). Still, the United States has stated that it is committed to abiding by the Convention to the extent it reflects customary international law. As announced in the President's United States Oceans Policy statement of 10 March 1983:

The United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the [1982 LOS] convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

B. Purpose. When maritime nations appear to acquiesce in excessive maritime claims and fail to exercise their rights actively in the face of constraints on international navigation and overflight, those claims and constraints may, in time, be considered to have been accepted by the international community as reflecting the practice of nations and as binding upon all users of the seas and superjacent airspace. Consequently, it is incumbent upon maritime nations to protest diplomatically all excessive claims of coastal or island nations and to exercise their navigation and overflight rights in the face of such claims. The President's Oceans Policy Statement makes clear that the United States has accepted this responsibility as a fundamental element of its national policy.

C. Freedom of Navigation (FON) Program. The purpose of the FON program is to preserve the global mobility of U.S. forces by avoiding acquiescence in excessive maritime claims of other nations. The FON Program combines diplomatic action and operational assertions of our navigation and overflight rights to encourage modification of, and to demonstrate nonacquiescence in, maritime claims that are inconsistent with the customary rules of international law pertaining to maritime

navigation and overflight freedoms. Those waters (and the air space above them) which are the subjects of excessive maritime claims of other nations (hereinafter "those waters") are cataloged in DoD 2005.1-M of 12 Jul 90, Maritime Claims Reference Manual. Uses of those waters which will be recorded as operational assertions are mostly uses which are planned well enough in advance to be placed on a list which is pre-approved under a classified and rather complicated procedure. See also DoD Inst. C-2005.1 of 21 Jun 83, U.S. Program for the Exercise of Navigation and Overflight Rights at Sea (U).

1211 RULES FOR NAVIGATIONAL SAFETY

A. International Rules. Most rules for navigational safety governing surface and subsurface vessels, including warships, are contained in the International Regulations for Preventing Collisions at Sea, 1972, known informally as the "International Rules of the Road" or "72 COLREGS." These rules apply to all international waters (i.e., the high seas, EEZs, and contiguous zones) and, except where a coastal or island nation has established different rules, in that nation's territorial sea, archipelagic waters, and inland waters as well. Article 1139, U.S. Navy Regulations, 1990, directs that all persons in the naval service responsible for the operation of naval ships and craft "shall diligently observe" the 1972 COLREGS.

B. National Rules. Many nations have adopted special rules for waters subject to their territorial sovereignty (i.e., internal waters, archipelagic waters, and territorial seas). Violation of these rules by U.S. Navy vessels may subject the U.S. to a lawsuit for collision or other damage, provide the basis for diplomatic protest, result in limitation on U.S. access to foreign ports, or provide the basis for other foreign action.

C. U.S. Inland Rules. The U.S. has adopted special Inland Rules applicable to navigation in U.S. waters landward of the demarcation line established by U.S. law for that purpose. (See U.S. Coast Guard publication CG 169; 33 C.F.R. Part 80; 33 U.S.C. §§ 2001-2073.) The 1972 COLREGS apply seaward of the demarcation line in U.S. national waters, in the U.S. contiguous zone and EEZ, and on the high seas.

1212 **U.S.-U.S.S.R. AGREEMENT ON THE PREVENTION OF INCIDENTS ON AND OVER THE HIGH SEAS.** To promote the safety of navigation and flight of their respective warships and military aircraft during encounters at sea, the United States and the Soviet Union in 1972 entered into the U.S.-U.S.S.R. Agreement on the Prevention of Incidents On and Over the High Seas. This Navy-to-Navy agreement, popularly referred to as the "Incidents at Sea" or "INCSEA" agreement, has been highly successful in minimizing the potential for harassing actions and navigational one-upmanship between U.S. and Soviet units operating in close proximity at sea. Although the agreement applies to warships and military aircraft operating on and over the "high seas," it is understood to embrace

such units operating in all international waters and international airspace, including that of the EEZ and the contiguous zone.

A. INCSEA Provisions. Principal provisions of the INCSEA agreement include:

1. Ships will observe strictly both the letter and the spirit of the International Rules of the Road.
2. Ships will remain well clear of one another to avoid risk of collision and, when engaged in surveillance activities, will exercise good seamanship so as not to embarrass or endanger ships under surveillance.
3. Ships will use special signals for signalling their operation and intentions.
4. Ships of one country will not simulate attacks by aiming guns, missile launchers, torpedo tubes, or other weapons at the ships of the other country, and will not launch any object in the direction of passing ships nor illuminate their navigation bridges.
5. Ships conducting exercises with submerged submarines will show the appropriate signals to warn of submarines in the area.
6. Ships, when approaching ships of the other party, particularly those engaged in replenishment or flight operations, will take appropriate measures not to hinder maneuvers of such ships and will remain well clear.

B. Amendment. The INCSEA agreement was amended in a 1973 protocol to extend certain provisions of the agreement to include nonmilitary ships. Specifically, U.S. and Soviet military ships and aircraft shall not make simulated attacks by aiming guns, missile launchers, torpedo tubes, and other weapons at nonmilitary ships of the other party nor launch or drop any objects near nonmilitary ships of the other party in such a manner as to be hazardous to these ships or to constitute a hazard to navigation. The agreement also provides for an annual review meeting between Navy representatives of the two parties to review its implementation.

MILITARY AIRCRAFT

1213 MILITARY AIRCRAFT GENERALLY

A. Defined. International law defines military aircraft to include all aircraft operated by commissioned units of the armed forces of a nation bearing the military markings of that nation, commanded by a member of the armed forces, and manned by a crew subject to regular armed forces discipline. Civilian owned and operated aircraft qualify as "state aircraft" if they are so designated by the United States and their full capacity has been contracted by the Military Airlift Command (MAC) for use in the military service of the United States. In those circumstances, they too enjoy sovereign immunity from foreign search and inspection. As a matter of policy, however, the United States normally does not designate MAC-charter as state aircraft.

B. International Status. Military aircraft are "state aircraft" within the meaning of the Convention on International Civil Aviation of 1944 (the "Chicago Convention"), and, like warships, enjoy sovereign immunity from foreign search and inspection. Subject to the right of transit passage and archipelagic sea lanes passage, state aircraft may not fly over or land on the territory (including the territorial sea) of another nation without authorization by special agreement or otherwise. Host nation officials may not board the aircraft without the consent of the aircraft commander. Should the aircraft commander fail to certify compliance with host nation customs, immigration or quarantine requirements, the aircraft may be directed to leave the territory and national airspace of that nation immediately.

1214 AIR NAVIGATION

A. National Airspace. Under international law, every nation has complete and exclusive sovereignty over its national airspace, i.e., the airspace above its territory, its internal waters, its territorial sea, and, in the case of an archipelagic nation, its archipelagic waters. Unlike warships, aircraft have no customary right of innocent passage through the airspace over the territorial sea or archipelagic waters. Accordingly, unless party to an international agreement to the contrary, all nations have complete discretion in regulating or prohibiting flights within their national airspace (as opposed to a Flight Information Region, discussed below), with the sole exception of overflight of international straits and archipelagic sea lanes. Aircraft wishing to enter national airspace must identify themselves, seek or confirm permission to land or to transit, and obey all reasonable orders to land, turn back, or fly a prescribed course and/or altitude. For military aircraft, permission is obtained by the local U.S. embassy ahead of time. Permission to enter foreign national airspace is called diplomatic clearance. Aircraft in distress are entitled to special consideration and should be allowed entry and emergency landing rights. Aircraft

enjoy a right of assistance entry analogous to warships.

B. International Straits Which Connect EEZ/High Seas to EEZ/High Seas and are Overlapped by Territorial Seas. All aircraft enjoy the right of unimpeded transit passage through the airspace above international straits overlapped by territorial waters. Transits must be continuous and expeditious; the aircraft must refrain from the threat or the use of force against the sovereignty, territorial integrity, or political independence of the bordering nation. These overflight rights cannot be suspended in peacetime for any reason. When the international strait is not completely overlapped by territorial seas, aircraft transiting above a high seas or exclusive economic zone (EEZ) navigation corridor enjoy the high seas freedom of overflight so long as they remain beyond the territorial sea.

C. Archipelagic Sea Lanes. Military aircraft enjoy the right of unimpeded passage through the airspace above archipelagic sea lanes. The right of overflight of such sea lanes is essentially identical to that of transit passage through the airspace above international straits overlapped by territorial seas.

D. International Airspace. International airspace is the airspace over the contiguous zone, the high seas, the EEZ, and territories not subject to national sovereignty (e.g., Antarctica). All international airspace is open to the aircraft of all nations. Accordingly, military aircraft are free to operate in international airspace without interference from national authorities. Military aircraft may engage in flight operations, including ordnance testing and firing, surveillance and intelligence gathering, and support of other naval activities. All such activities must be conducted with due regard for the rights of other nations and the safety of other aircraft and of vessels. (Note, however, that the Antarctic Treaty prohibits military maneuvers and weapons testing in Antarctic airspace.) These same principles apply with respect to the overflight of high seas or EEZ corridors through that part of international straits not overlapped by territorial seas.

1215 CONVENTION ON INTERNATIONAL CIVIL AVIATION.

As are most nations, the United States is a party to the 1944 Convention on International Civil Aviation. That multilateral treaty, commonly referred to as the "Chicago Convention," applies to civil aircraft. It does not apply to military aircraft or MAC-charter aircraft designated as "state aircraft," other than to require that they operate with "due regard for the safety of navigation of civil aircraft." The Chicago Convention established the International Civil Aviation Organization (ICAO) to develop international air navigation principles and techniques and to promote safety of flight in international air navigation. Various operational situations do not lend themselves to ICAO flight procedures, e.g., military contingencies, classified missions, politically sensitive missions, or routine aircraft carrier operations. Operations not conducted under ICAO flight procedures are conducted under the "due regard" or "operational" prerogative of military aircraft. For additional information see DoD Directive 4540.1 and OPNAVINST 3770.4.

1216 FLIGHT INFORMATION REGIONS (FIRs). A FIR is a defined area of airspace within which flight information and alerting services are provided. ICAO establishes FIRs in national and international air space to promote the safety of civil aviation. Within a FIR, flight information and alerting services are provided by air traffic controllers designated by ICAO. Local coastal nation air traffic controllers are "double hatted" with this ICAO responsibility. As a matter of policy, U.S. military aircraft on routine point-to-point flights through international airspace ordinarily follow ICAO flight procedures and use FIR services. Exceptions to this policy include military contingency operations, classified or politically sensitive missions, and routine aircraft carrier operations or other training activities. When U.S. military aircraft do not follow ICAO flight procedures, they must navigate with "due regard" for civil aviation safety. Some coastal nations seek to bill military aircraft for "services" provided during flights through a FIR. With regard to military aircraft, U.S. policy is to decline payment.

1217 AIR DEFENSE IDENTIFICATION ZONES IN INTERNATIONAL AIRSPACE. Pursuant to their right to establish reasonable conditions of entry into their territory, nations may establish Air Defense Identification Zones (ADIZs) in the international airspace adjacent to their territorial airspace. Accordingly, an aircraft approaching national airspace can be required to identify itself while in international airspace as a condition of entry approval. ADIZ regulations promulgated by the U.S. apply to aircraft bound for U.S. territorial airspace and require the filing of flight plans and periodic position reports. Some nations, notably India, Libya, Greece, Seychelles, and Mauritius, purport to require all aircraft penetrating an ADIZ to comply with ADIZ procedures regardless of whether they intend to enter national airspace. The U.S. does not recognize this extension. Unless the U.S. has specifically agreed to do so, military aircraft not intending to enter national airspace need not identify themselves or otherwise comply with ADIZ procedures established by other nations.

1218 NAVIGATIONAL RULES FOR AIRCRAFT. Rules for air navigation in international airspace applicable to civil aircraft may be found in Annex 2 (Rules of the Air) to the Chicago Convention, DoD Flight Information Publication (FLIP) General Planning, and OPNAVINST 3710.7 (series) NATOPS Manual. The same standardized technical principles and policies of ICAO that apply in international and most foreign airspace are also in effect in the continental United States. Consequently, U.S. pilots can fly all major international routes following the same general rules of the air, using the same navigation equipment and communication practices and procedures, and being governed by the same air traffic control services with which they are familiar in the United States.

1219 U.S.-U.S.S.R. AGREEMENT ON THE PREVENTION OF INCIDENTS ON AND OVER THE HIGH SEAS. To promote the safety of navigation and flight of their respective warships and military aircraft during

encounters at sea, the United States and the Soviet Union in 1972 entered into the U.S.-U.S.S.R. Agreement on the Prevention of Incidents On and Over the High Seas. This Navy-to-Navy agreement, popularly referred to as the "Incidents at Sea" or "INCSEA" agreement is discussed in more detail in the chapter entitled "Warships" in this Deskbook. With regard to aircraft, INCSEA provisions include:

- A. Ships, when approaching ships of the other party, particularly those engaged in replenishment or flight operations, will take appropriate measures not to hinder maneuvers of such ships and will remain well clear.
- B. Aircraft will use the greatest caution and prudence in approaching aircraft and ships of the other party, in particular ships engaged in launching and landing aircraft, and will not simulate attacks by the simulated use of weapons or perform aerobatics over ships of the other party nor drop objects near them.

1220 **INTERCEPTION OF CIVILIAN AIRCRAFT.** Annex 2, attachment A, to the Chicago Convention contains recommended procedures for military intercepts of civil aircraft, which should be undertaken only as last resort. If initiated, interception should be limited to determining the aircraft's identity and providing navigational guidance for safe conduct. Intercepting aircraft should refrain from use of weapons in all cases of interception of civil aircraft. The United States has notified ICAO that it follows these intercept procedures. After the downing of KAL-007, the U.S. joined 106 other nations in the ICAO Assembly in adopting an amendment to Art. 3 of the Chicago Convention specifically prohibiting "the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered."

A. **Amendment Provisions.** In this connection, the Chicago Convention has been amended to provide:

1. That all nations must refrain from the use of weapons against civil aircraft, and, in the case of the interception of intruding civil aircraft, that the lives of persons on board and the safety of the aircraft must not be endangered. (This provision does not, however, detract from the right of self-defense recognized under Article 51 of the United Nations Charter.)

2. That all nations have the right to require intruding aircraft to land at some designated airfield and to resort to appropriate means consistent with international law to require intruding aircraft to desist from activities in violation of the Convention.

3. That all intruding civil aircraft must comply with the orders given to them and that all nations must enact national laws making such compliance by

their civil aircraft mandatory.

4. That all nations shall prohibit the deliberate "use of their civil aircraft for purposes (such as intelligence collection) inconsistent with the Convention.

B. Effect. The amendment was approved unanimously on 10 May 1984 and will come into force upon ratification by 102 of ICAO's members. The Convention, by its terms, does not apply to intruding military aircraft. The U.S. takes the position that customary international law establishes similar standards of reasonableness and proportionality with respect to military aircraft that stray into national airspace through navigational error or that are in distress. Recognizing that the use of force against an aircraft is likely to kill people on board and may kill or injure persons on the ground, the U.S. Coast Guard position is that there is no authority to use deadly force against a civilian aircraft during drug law enforcement operations.

PROTECTION OF PERSONS AND PROPERTY AT SEA

1221 **RESCUE.** Mishaps frequently occur at sea. The obligation of mariners to provide material aid in cases of distress encountered at sea has long been recognized in custom, tradition, and both the 1958 Geneva Convention on the High Seas and the 1982 U.N. Convention on the Law of the Sea (1982 LOS Convention). Article 0925, U.S. Navy Regulations, 1990, requires that, insofar as he can do so without serious danger to his ship or crew, the commanding officer or senior officer present, as appropriate, shall proceed with all possible speed to the rescue of persons in distress if informed of their need for assistance (insofar as this can reasonably be expected of him); render assistance to any person found at sea in danger of being lost; and, after a collision, render assistance to the other ship, her crew and passengers, and, where possible, inform the other ship of his identity. The United States is also a party to the 1974 London Convention on Safety of Life at Sea, which imposes the additional requirement to broadcast warning messages with respect to dangerous conditions or hazards encountered at sea.

1222 **SAFE HARBOR.** Under international law, no port may be closed to a foreign ship seeking shelter from storm or bad weather or otherwise compelled to enter it in distress, unless another equally safe port is open to the distressed vessel to which it may proceed without additional jeopardy. The distress must be real and based on a wellfounded apprehension of loss of the vessel, cargo, or crew. In general, the distressed vessel may enter a port without being subject to local regulations concerning any penalty, incapacity, prohibition, duties, or taxes in force at that port.

1223 **INNOCENT PASSAGE.** Innocent passage through territorial seas and archipelagic waters includes stopping and anchoring when necessitated by force

majeure or by distress. Stopping and anchoring in such waters for the purpose of rendering assistance to others in similar danger or distress is also permitted by international law.

1224 **QUARANTINE.** Article 0859, U.S. Navy Regulations, 1990, requires that the commanding officer of a ship or aircraft commander comply with quarantine regulations and restrictions. Commanding officers will not permit foreign inspection of his vessel or aircraft but shall afford every other assistance to health officials, U.S. or foreign, and shall give all information required, insofar as permitted by the requirements of military necessity and security.

1225 **REPRESSION OF PIRACY.** International law has long recognized a general duty of all nations to cooperate in the repression of piracy. This obligation is included in the 1958 Geneva Convention on the High Seas and the 1982 LOS Convention. Exercising its constitutional powers under Article I, Section 8, Congress prescribes life imprisonment for conviction of piracy. 18 U.S.C. § 1651.

A. **Piracy Defined.** Piracy is an international crime consisting of illegal acts of violence, detention, or depredation committed for private ends by the crew or passengers of a private ship or aircraft in or over international waters against another ship or aircraft or persons and property on board. Depredation is the act of plundering, robbing or pillaging. The same acts committed in the territorial sea, archipelagic waters, or national airspace are crimes within the jurisdiction and sovereignty of the littoral nation, not piracy. Mutiny is not piracy unless the mutinous crew uses the vessel to commit piracy.

B. **Seizure of Pirate Vessels and Aircraft.** When a pirate vessel or aircraft is encountered in or over U.S. or international waters it may be seized and detained by any U.S. Navy warship or aircraft. Every effort should be made to obtain the consent of the littoral nation before pursuing pirate vessels into its waters. The pirate vessel or aircraft, and all persons on board, should be taken to the nearest U.S. port or airfield and delivered to U.S. law enforcement authorities for disposition under U.S. law. Alternatively, higher authority may arrange disposition of the matter with another nation; every nation has jurisdiction.

1226 **PROHIBITION OF THE TRANSPORT OF SLAVES.** International law strictly prohibits use of the seas for the purpose of transporting slaves. The 1982 LOS Convention requires every nation to prevent and punish the transport of slaves in ships authorized to fly its flag. Commanders should request guidance from higher authority if confronted with this situation.

1227 **SUPPRESSION OF UNAUTHORIZED BROADCASTING.** The 1982 LOS Convention provides that all nations shall cooperate in the suppression of unauthorized broadcasting from international waters. Unauthorized broadcasting

involves the transmission of radio or television signals from a ship or off-shore facility intended for receipt by the general public, contrary to international regulation. Commanders should request guidance from higher authority if confronted with this situation.

1228 **WARSHIP'S RIGHT OF APPROACH AND VISIT.** As a general principle, vessels in international waters are immune from the jurisdiction of any nation other than the flag nation. However, under international law, a warship may approach any vessel in international waters to verify its nationality. Unless the vessel encountered is itself a warship or government vessel of another nation, it may be stopped, boarded, and the ship's documents examined, provided there is reasonable ground for suspecting that it is engaged in piracy, the slave trade, or unauthorized broadcasting. Vessels may also be stopped if they are without nationality or, in reality, of the same nationality as the warship but falsely flying another flag or none at all.

1229 **HOT PURSUIT.** The hot pursuit of a foreign ship may be undertaken as a law enforcement action when the coastal or island nation has reason to believe that the ship has violated its laws or regulations. To be valid, the pursuit must begin when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea, or the contiguous zone of the pursuing nation. The pursuit may only be continued outside the territorial sea or contiguous zone if the pursuit has been continuous.

A. Procedure. Pursuit may begin only after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship. The location of the pursuing ship when the order to stop is given is irrelevant. If the foreign ship is within a contiguous zone, the nation may pursue only if the ship violated rights the zone was established to protect. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own or another nation. The right of hot pursuit may be exercised only by warships, military aircraft or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect. The right of hot pursuit applies also to violations in the exclusive economic zone (EEZ) or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal or island nation applicable to the EEZ or the continental shelf, including such safety zones.

B. Hot Pursuit by Aircraft. In addition to the rules above, where hot pursuit is effected by aircraft, the aircraft must do more than merely sight the offender or suspected offender to justify an arrest outside the territorial sea. The aircraft must first order the suspected offender to stop; if the offender fails to comply, the aircraft may pursue, alone or in conjunction with other aircraft or ships. Pursuit must continue without interruption a ship of the coastal or island nation arrives to take over and arrest the ship.

1230 **PROTECTION OF U.S. FLAG VESSELS AND AIRCRAFT, U.S. CITIZENS AND PROPERTY.** The international law doctrines of self-defense and protection of nationals permit the use of proportionate force by U.S. warships and military aircraft as necessary to protect U.S. flag vessels and aircraft, U.S. citizens (whether embarked in U.S. or foreign flag vessels), and their property against unlawful violence in and over international waters. JCS Peacetime rules of engagement (ROE), as incorporated into applicable operational orders, operational plans, and contingency plans, provide guidance to the naval commander for the exercise of this inherent authority.

A. **In Foreign Internal Waters, Archipelagic Waters, and Territorial Seas.** The coastal or island nation is responsible for the protection of all vessels, aircraft and persons lawfully within its sovereign territory. When that nation is unable or unwilling to take timely and effective action, however, international law recognizes the right of another nation to direct its warships and military aircraft to use proportionate force in or over those waters to protect its flag vessels and its citizens. Because the coastal or island nation may lawfully exercise jurisdiction and control over foreign flag vessels, aircraft and citizens within its internal waters, archipelagic waters, territorial seas and national airspace, special care must be taken by the warships and military aircraft of other nations not to interfere with the lawful exercise of jurisdiction by that nation in those waters.

B. **Foreign Contiguous Zones and EEZs.** The responsibility of coastal or island nations to protect foreign shipping and aircraft ends at the seaward edge of the territorial sea. Beyond that point, each nation bears the primary responsibility for the protection of its own flag vessels and aircraft and its own citizens and their property. The coastal or island nation may properly exercise jurisdiction over foreign vessels, aircraft and persons in and over its contiguous zone to enforce its customs, fiscal, immigration, and sanitary laws, and in its EEZ to enforce its resource-related regulations. When the coastal or island nation is acting in that capacity, or is in lawful hot pursuit, the flag nation should not interfere. Naval commanders should consult applicable peacetime ROE for specific guidance.

C. **Government Property Lost at Sea.** Sovereign property lost at sea remains vested in that sovereign until title is formally relinquished or abandoned. Sovereign property includes aircraft wreckage, sunken vessels, practice torpedoes, test missiles, and target drones. The general rule applies regardless of whether the cause of the sinking was through accident or enemy action (unless the warship or aircraft was captured before it sank). As a matter of policy, the U.S. Government does not grant permission to salvage sunken U.S. warships or military aircraft that contain the remains of deceased service personnel or explosive material. Requests from foreign countries to have their sunken warships or military aircraft, located in U.S. waters, similarly respected by salvors, are honored. Should U.S. property be recovered at sea by foreign entities, U.S. will demand its immediate return. Specific

guidance for the on-scene commander in such circumstances is contained in the applicable operation order.

1231 **PROTECTION OF FOREIGN FLAG VESSELS, AIRCRAFT AND PERSONS.** The international law concept of collective self-defense permits the use of proportionate force as necessary to protect foreign flag vessels and aircraft and foreign persons from unlawful violence at sea. Consent of the flag nation should first be obtained unless prior arrangements are already in place or the need to act immediately to save human life precludes such efforts.

1232 **ASYLUM AND TEMPORARY REFUGE**

A. References

1. Article 0939, U.S. Navy Regulations, 1990
2. SECNAVINST 5710.22 series
3. NWP 9 (Rev. A)
4. FMFM 1-10, paragraph 3.3

B. Definitions

1. Asylum. The United States defines "asylum" as:

Protection and sanctuary granted by the U.S. Government within its territorial jurisdiction or in international waters to a foreign national who applies for such protection because of persecution or fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

2. Temporary Refuge. SECNAVINST 5710.22 defines "temporary refuge" as:

Protection afforded for humanitarian reasons to a foreign national in a Department of Defense shore installation, facility, or military vessel within the territorial jurisdiction of a foreign nation or in international waters, under conditions of urgency in order to secure the life or safety of that person against imminent danger, such as pursuit by a mob.

- C. Procedures. The rules governing asylum and temporary refuge depend in part on where the request is made.

1. On the high seas or in territories under exclusive U.S. jurisdiction (including 50 states, Puerto Rico, territories or possessions, and U.S. territorial seas), foreign nationals seeking asylum will be received aboard the naval installation, aircraft or vessel. Military authorities may grant temporary refuge; only the Secretary of State may grant asylum.

2. If a request for asylum or refuge is made in foreign territory or territorial seas under foreign jurisdiction, the applicant will be advised to apply in person at the nearest American Consulate or Embassy. An applicant may be received aboard and given temporary refuge ONLY under extreme or exceptional circumstances where his life or safety is in imminent danger (e.g., where he is being pursued by a mob). If already on board, however, the foreign national will not be surrendered to foreign jurisdiction or control without the personal direction of SECNAV or higher authority.

D. Notification. Regardless of the location of the unit involved, any action taken upon a request for asylum or refuge must be reported to CNO or CMC, as appropriate, by the fastest available means. Telephone or other voice communication is preferred but, in any case, an immediate precedence message (info: SECSTATE) must be sent confirming the telephone or voice radio report. All requests from foreign governments for release of the applicant will be referred to CNO/CMC and the requesting authorities shall be advised of the referral.

E. Release. Once received aboard an installation, aircraft or vessel, an applicant will not be turned over to foreign officials without personal permission from SECNAV or higher authority, regardless of where the accepting unit is located.

F. Solicitation Prohibited. DoN personnel are prohibited from directly or indirectly inviting persons to seek asylum or temporary refuge. No information concerning a request for political asylum or temporary refuge will be released to the public or media without the prior approval of the Assistant Secretary of Defense for Public Affairs.

G. Public Announcement. No public statement concerning political asylum or temporary refuge cases should be released without authorization by the Assistant Secretary of Defense for Public Affairs. DoD Directive 2000.11 of 3 March 1972 and SECNAVINST 5710.22B. In foreign territory, any such announcements should also be coordinated with the U.S. Embassy.

H. Reporting Requirements. Upon receipt of a request for political asylum or temporary refuge on board a U.S. installation or vessel, the information below should be reported via OPREP-3 PINNACLE procedures (chapter 2, section II, of OPNAVINST R3100.6D; see also MCO 5740.2E). Initial reports should not be delayed pending further developments.

1. Name and nationality of the person requesting asylum (or temporary refuge).
2. Date, place of birth, and occupation.
3. Description of any documentation in his possession.
4. List of foreign authorities who are aware of or will be notified of the request.
5. Circumstances surrounding the request.
6. Exact location. If aboard a vessel or aircraft, give the estimated time of arrival at next port or airport.
7. Reason for requesting asylum or temporary refuge.
8. Description of any criminal charges known or alleged to be pending against the person requesting asylum. Specifically indicate if any piracy at sea, air piracy, or hijacking is involved.
9. Any Communist Party or other political party affiliation. Also list any government office now held or previously occupied.
10. If applicable, whether a field office of the Immigration and Naturalization Service (INS) has been notified and if arrangements have been made to transfer the case to INS.
11. Any other pertinent information.

CHAPTER 13

THE LAW OF ARMED CONFLICT

1301 **INTRODUCTION.** Article 2 of the U.N. Charter requires all nations to settle their international disputes by peaceful means and to refrain from the threat or use of force against the territorial integrity or political independence of other nations. The use of force is prohibited war except as an enforcement action taken by or on behalf of the United Nations or as a measure of individual or collective self-defense. Regardless of whether a nation's use of force in a particular circumstance is prohibited by the U.N. Charter, the manner in which states and combatants conduct those hostilities is regulated by the law of armed conflict. The principal sources of the law of armed conflict (as with international law generally) are custom, as reflected in the practice of nations, and international agreements. The lack of precision in defining and interpreting the rules of customary law has been a principal motivation behind efforts to codify the law of armed conflict through treaties and conventions.

1302 **PURPOSE.** The purpose of the law of armed conflict is not to impede the waging of hostilities but to ensure that the violence of hostilities is directed toward the enemy's forces and is not used to cause unnecessary suffering and destruction. In this regard, the law of armed conflict complements and supports the principles of warfare embodied in the military concepts of objective, mass, economy of force, surprise, and security. Together, these concepts underscore the importance of concentrating forces against critical military targets while avoiding the expenditure of personnel and resources against persons, places, and things that are militarily unimportant.

1303 **GENERAL PRINCIPLES.** The law of armed conflict seeks to prevent unnecessary suffering and destruction by limiting the harmful effects of hostilities through, minimum standards of protection to be accorded to "combatants" and to "noncombatants." The law of armed conflict embraces three central concepts:

A. **Necessity.** Only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied.

B. **Proportionality.** The employment of any kind or degree of force not required for the purpose of the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources, is prohibited. Collateral damage is not disproportionate or excessive to the military advantage gained from the use of that force.

C. Humanity. Civilians and noncombatants will be protected. To limit casualties, the law of armed conflict forbids those measures of violence which are not necessary and proportionate to the achievement of a definite military advantage. The law seeks to avoid unnecessary suffering, superfluous injury, and indiscriminate effects. Dishonorable (treacherous) means, expedients, and conduct during armed conflict are forbidden.

THE LAW OF NAVAL TARGETING

1304 GENERAL PRINCIPLES OF TARGETING

A. Principles. The law of naval targeting is premised upon the three fundamental principles of the law of armed conflict:

1. The right of belligerents to adopt means of injuring the enemy is not unlimited.
2. Belligerents are prohibited from launch attacks against the civilian population as such.
3. Distinctions must be made between combatants and noncombatants, to the effect that noncombatants be spared as much as possible.

B. Discussion. These legal principles governing targeting generally parallel the military principles of the "objective," "mass," and "economy of force." The law requires that only objectives of military importance be attacked but permits the use of sufficient mass to destroy those objectives. At the same time, unnecessary (and wasteful) collateral destruction and human suffering must be avoided to the extent possible and, consistent with mission accomplishment and the security of the force, unnecessary human suffering prevented. The law of naval targeting, therefore, requires that all reasonable precautions must be taken to ensure that only military objectives are targeted so that civilians and civilian objects are spared to the extent possible.

1305 **MILITARY OBJECTIVE**. Only combatants and other military objectives may be attacked. Military objectives are those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. Military advantage may involve a variety of considerations including the security of the attacking force.

A. Proper Targets. Proper targets for naval attack include enemy warships and military aircraft, naval and military auxiliaries, and military bases ashore, warship construction and repair facilities, military depots and warehouses, POL storage areas, docks, port facilities, harbors, bridges, airfields, military vehicles, armor, artillery, ammunition stores, troop concentrations and embarkation points, lines of communication and other objects used to conduct or support military operations. Proper naval targets also include geographic targets, such as a mountain pass, and buildings and facilities that provide administrative and personnel support for military and naval operations such as barracks, communications and command and control facilities, headquarters buildings, mess halls, and training areas.

B. Economic Targets. Proper economic targets for naval attack include enemy lines of communication used for military purposes, rail yards, bridges, rolling stock, barges, lighters, industrial installations producing war-fighting products, and power generation plants. Economic targets that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked.

C. Civilian Objects. Civilian objects may NOT be made the object of attack. Civilian objects consist of all civilian property and activities other than those used to support or sustain the enemy's war-fighting capability. Attacks on installations such as dikes and dams are prohibited if their breach or destruction would result in the loss of civilian lives disproportionate to the military advantage to be gained. Similarly, the intentional destruction of food, crops, livestock, drinking water, and other objects indispensable to the survival of the civilian population, for the specific purpose of denying the civilian population of their use, is prohibited.

1306 **INCIDENTAL INJURY AND COLLATERAL DAMAGE.** Causing incidental injury or death to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective is not unlawful; it must not, however, be excessive in light of the military advantage to be gained by the attack. Commanders must take all practicable precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to the absolute minimum consistent with mission accomplishment and the security of the force. In each instance, the commander, on the basis of an honest and reasonable estimate of the facts available to him, must determine whether incidental injuries and collateral damage would be excessive or whether to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and damage.

1307 **SURFACE WARFARE.** As a general rule, surface warships may employ their conventional weapons systems to attack, capture, or destroy enemy surface, subsurface, and air targets at sea wherever located beyond neutral territory. The law of armed conflict pertaining to surface warfare is concerned primarily with the protection of noncombatants through rules establishing lawful targets of attack. For that purpose, all enemy vessels and aircraft fall into one of three general classes, i.e., warships and military aircraft, merchant vessels and civilian aircraft, and

exempt vessels and aircraft.

A. Enemy Warships and Military Aircraft. Enemy warships and military aircraft, including naval and military auxiliaries, are subject to attack, destruction, or capture anywhere beyond neutral territory.

1. Warships. Once an enemy warship has clearly indicated a readiness to surrender by hauling down her flag, by hoisting a white flag, by surfacing (in the case of submarines), by stopping engines and responding to the attacker's signals, or by taking to lifeboats, the attack must be discontinued. Commanders may NOT refuse quarter to any enemy who has surrendered in good faith. Prize procedure is not used for captured enemy warships and naval auxiliaries because their ownership vests immediately in the captor's government by the fact of capture.

2. Aircraft. Disabled enemy aircraft in air combat are frequently pursued to destruction because of the impossibility of verifying their true status and inability to enforce surrender. Although disabled, the aircraft may or may not have lost its means of combat. Moreover, it still may represent a valuable military asset. Accordingly, surrender in air combat is not generally offered. However, if surrender is offered in good faith so that circumstances do not preclude enforcement, it must be respected.

B. Enemy Merchant Vessels and Civilian Aircraft

1. Capture. Enemy merchant vessels and civil aircraft may be captured at sea wherever located beyond neutral territory. Prior exercise of visit and search is not required, provided positive determination of enemy status can be made by other means.

a. When military circumstances preclude sending or taking in such vessel or aircraft for adjudication as an enemy prize, it may be destroyed after all possible measures are taken to provide for the safety of passengers and crew. Documents and papers relating to the prize should be safeguarded and, if practicable, the personal effects of passengers should be saved. Every case of destruction of a captured enemy prize should be reported promptly to higher command.

b. Officers and crews of captured enemy merchant ships and civilian aircraft may be made prisoners of war. Other enemy nationals on board are subject to the discipline of the captor. Nationals of a neutral nation on board are not made prisoners of war unless they have participated in acts of hostility or resistance against the captor.

2. Destruction. Enemy merchant vessels may be attacked and destroyed by surface warships, either with or without prior warning, in any of the

following circumstances:

- a. Actively resisting visit and search or capture;
- b. Refusing to stop upon being duly summoned;
- c. Sailing under convoy of enemy warships or enemy military aircraft;
- d. If armed;
- e. If incorporated into, or assisting in any way, the intelligence system of the enemy's armed forces;
- f. If acting in any capacity as a naval or military auxiliary to an enemy's forces; or
- g. If integrated into the enemy's war-fighting/ war-sustaining effort and compliance with the rules of the 1936 London Protocol would, under the circumstances of the specific encounter, subject the surface warship to imminent danger or otherwise preclude mission accomplishment.

3. Recovery. After each engagement with warships or merchant vessels, all possible measures should be taken without delay to search for and collect the shipwrecked, wounded, and sick and to recover the dead, as far as military exigencies permit.

C. Exempt Vessels and Aircraft. Certain classes of enemy vessels and aircraft are exempt from capture or destruction provided they are innocently employed in their exempt category. These specially protected vessels and aircraft must not take part in the hostilities, must not hamper the movement of combatants, must submit to identification and inspection procedures, and may be ordered out of harm's way. If an enemy vessel or aircraft assists the enemy's military effort in any manner, it may be captured or destroyed. Refusal to provide immediate identification upon demand is ordinarily sufficient legal justification for capture or destruction. These specifically exempt vessels and aircraft include:

1. Vessels and aircraft designated for and engaged in the exchange of prisoners (cartel vessels);
2. Properly designated and marked hospital ships, medical transports, and known medical aircraft;
3. Vessels charged with religious, non-military scientific, or

philanthropic missions. (Vessels engaged in the collection of scientific data of potential military application are not exempt.)

4. Vessels and aircraft guaranteed safe conduct by prior arrangement between the belligerents.
5. Small coastal (not deep-sea) fishing vessels and small boats engaged in local coastal trade. Such vessels and boats are subject to the regulations of a belligerent naval commander operating in the area.
6. Civilian passenger vessels at sea and civil airliners in flight are subject to capture but are exempt from destruction. Although enemy lines of communication are generally legitimate military targets in modern warfare, civilian passenger vessels at sea, and civil airliners in flight, are exempt from destruction, unless at the time of the encounter they are being used by the enemy for a military purpose (e.g., transporting troops or military cargo) or refuse to respond to the directions of the intercepting warship or military aircraft. Such passenger vessels in port and airliners on the ground are not protected from destruction.

1308 **SUBMARINE WARFARE.** The law of armed conflict imposes essentially the same rules on submarines as apply to surface warships. Submarines may employ their conventional weapons systems to attack, capture, or destroy enemy surface, subsurface or air targets wherever located beyond neutral territory. Enemy warships and naval auxiliaries may be attacked and destroyed without warning. Rules applicable to surface warships regarding enemy ships that have surrendered in good faith, or that have indicated clearly their intention to do so, apply as well to submarines. To the extent that military exigencies permit, submarines are also required to search for and collect the shipwrecked, wounded, and sick, following an engagement. If not practicable, the location of possible survivors should be passed at the first opportunity to a surface ship, aircraft, or shore facility capable of rendering assistance.

A. Interdiction of Enemy Merchant Shipping. The United States considers that the London Protocol of 1936, coupled with the customary practice of belligerents during and following World War II, imposes upon submarines the responsibility to provide for the safety of passengers, crew, and ship's papers before destruction of an enemy merchant vessel, unless:

1. The vessel refuses to stop when summoned to do so or otherwise resists capture;
2. The enemy merchant vessel is sailing under armed convoy or is

itself armed;

3. The enemy merchant vessel is assisting in any way the enemy's military intelligence seem or is acting in any capacity as a naval auxiliary to the enemy's armed forces; or
4. The enemy has integrated its merchant shipping into its war-fighting/war-sustaining effort and compliance with this rule would, under the circumstances of the specific encounter, subject the submarine to imminent danger or would otherwise preclude mission accomplishment.

B. Exempt Vessels. Rules of naval warfare regarding enemy vessels that are exempt from capture or destruction by surface warships apply as well to submarines.

1309 **AIR WARFARE AT SEA.** Military aircraft may employ conventional weapons to attack and destroy warships and military aircraft, including naval and military auxiliaries, anywhere at sea beyond neutral territory. To the extent that military exigencies permit, military aircraft are required to search for the shipwrecked, wounded, and sick following an engagement at sea. The location of possible survivors should be passed at the first opportunity to a surface vessel, aircraft, or shore facility capable of rendering assistance. Enemy merchant vessels and civil aircraft may be attacked and destroyed by military aircraft only under the following circumstances:

- A. When refusing to comply with directions from the intercepting aircraft;
- B. When assisting in any way the enemy's military intelligence system or acting in any capacity as auxiliaries to the enemy's armed forces;
- C. When sailing under convoy of enemy warships, escorted by enemy military aircraft, or armed; or
- D. When otherwise integrated into the enemy's war-fighting or war-sustaining effort.

1310 **BOMBARDMENT.** "Bombardment" refers to naval and air bombardment of enemy targets on land with conventional weapons, including naval guns, rockets and missiles and air-delivered ordnance. Generally, the following rules reflect the underlying broad principles that belligerents are forbidden to make noncombatants the target of direct attack, that superfluous injury and unnecessary suffering are to be avoided, and that wanton destruction of property is prohibited.

- A. Destruction of Civilian Habitation. The wanton or deliberate

destruction of areas of concentrated civilian habitation, including cities, towns, and villages, is prohibited. See the "Noncombatants" section in this chapter for a more detailed discussion.

B. Undefended Cities or Agreed Demilitarized Zones. Belligerents are forbidden to bombard a city or town that is undefended and that is open to immediate entry by their own or allied forces. A city or town behind enemy lines is, by definition, neither undefended nor open; military targets therein may be destroyed by bombardment. An agreed demilitarized zone is also exempt from bombardment.

C. Medical Facilities. Medical establishments and units, both mobile and fixed—medical vehicles, and medical equipment and stores may not be deliberately bombarded. Belligerents are required to ensure that such medical facilities are readily identifiable and, as far as possible, situated in such a manner to avoid that attacks against military targets in the vicinity do not imperil their safety. Any object *recognized* as a medical facility, however, may not be attacked, regardless of the absence of markings. If medical facilities are used for purposes inconsistent with their humanitarian mission, and appropriate warnings are ignored, they become subject to attack. When established by agreement between the belligerents, hospital zones and neutralized zones are immune from bombardment per the terms of the agreement.

D. Religious, Cultural, and Charitable Buildings and Monuments. Such buildings and monuments should not be bombarded, provided they are not used for military purposes. Local inhabitants have the responsibility to ensure that such buildings and monuments are clearly marked with the distinctive emblem of such sites: a rectangle divided diagonally, the upper portion black and the lower white.

E. Dams and Dikes. Dams, dikes, levees, and other installations, which if breached or destroyed would release flood waters or other forces dangerous to the civilian population, should not be bombarded if the potential for harm to noncombatants would be excessive in relation to the military advantage to be gained by bombardment. Conversely, installations containing such dangerous forces that are used by belligerents to shield or support military activities are not so protected.

F. Warning Before Bombardment. Where the military situation permits, commanders should make every reasonable effort to warn the civilian population located in close proximity to a military objective targeted for bombardment. Warnings may be general rather than specific warnings lest the bombarding force or the success of its mission be jeopardized.

NONCOMBATANTS

1311 **NONCOMBATANTS GENERALLY.** The law of armed conflict is based largely on the distinction to be made between combatants and noncombatants. In accordance with this distinction, the population of a nation engaged in armed conflict is divided into two general classes: armed forces (combatants) and the civilian populace (noncombatants). Each class has specific rights and obligations in time of armed conflict. No individual can be a combatant and a noncombatant simultaneously. The term "noncombatant" is primarily applied to those individuals who do not form a part of the armed forces and who otherwise refrain from the commission or direct support of hostile acts. In this context, noncombatants and generally, the civilian population, are synonymous. The term noncombatants also includes those members of the armed forces who enjoy special protected status, such as medical personnel and chaplains, or who have been rendered incapable of combat by wounds, sickness, shipwreck, or capture. This chapter reviews the categories of noncombatants and outlines the general rules of the law of armed conflict designed to protect them from direct attack.

1312 **PROTECTED STATUS.** The law of armed conflict prohibits the intentional attack of noncombatants and requires to the extent possible that they be safeguarded against injury. When circumstances permit, advance warning should be given of attacks that might endanger noncombatants in the vicinity. Such warnings are not required, however, if mission accomplishment, including the security of attacking forces, is premised on the element of surprise. On the other hand, a party to an armed conflict that has control over civilians and other noncombatants has an affirmative duty to remove them from the vicinity of targets of likely enemy attack and to otherwise separate military activities and facilities from areas of noncombatant concentration. Deliberate use of noncombatants to shield military objectives from enemy attack is prohibited. The presence of noncombatants within or adjacent to a legitimate target does not, however, preclude its attack.

1313 **THE CIVILIAN POPULATION.** The civilian population as such, as well as individual civilians, may not be the object of attack or of threats or acts intended to instill terror.

A. Scope of Protection. The civilian population consists of all persons not serving in the armed forces, militia, or paramilitary forces and not otherwise taking a direct part in the hostilities. Women and children are entitled to special respect and protection.

B. Loss of Protection. Civilians, unlike combatant military personnel who are always subject to attack, are immune from attack unless they are acting indirect support of the enemy's war-fighting or -sustaining effort. Civilians lose their

immunity and may be attacked if they take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy persons; destroying enemy property; or serving as lookouts, guards, or intelligence agents for military forces. Civilians providing command, administrative, or logistic support to military operations are subject to attack while so engaged. Similarly, civilian employees of naval shipyards, merchant seamen in ships carrying military cargoes, and laborers engaged in the construction of military fortifications, may be attacked while so employed.

1314 **THE WOUNDED AND SICK.** Members of the armed forces incapable of participating in combat due to injury or illness may not be intentionally attacked. Moreover, parties to any armed engagement must, without delay, take all possible measures to search for and collect the wounded and sick on the field of battle, protect them from harm, and ensure their care. When circumstances permit, an armistice or cease-fire should be arranged to enable the wounded and sick to be located and removed to safety and medical care. Wounded and sick personnel falling into enemy hands must be treated humanely and cared for without distinction. Priority of treatment for all military personnel may only be justified by urgent medical considerations. The physical or mental well-being of enemy wounded and sick personnel may not be unjustifiably endangered, nor may they be subjected to any medical procedure not called for by their condition or inconsistent with accepted medical standards.

1315 **MEDICAL PERSONNEL.** Medical personnel, including medical and dental officers, technicians and corpsmen, nurses, and medical service personnel, have special protected status when engaged **EXCLUSIVELY** in medical duties and may not be attacked. Possession of small arms for self-protection, for the protection of the wounded and sick, and for protection from marauders and others violating the law of armed conflict does not disqualify medical personnel from protected status. Medical personnel may not use such arms against enemy forces acting in conformity with the law of armed conflict. Medical personnel should display the distinctive emblem of the Red Cross when engaged in their respective medical activities. Captured medical personnel and chaplains (below) do not become prisoners of war. They may, however, be detained by the enemy to provide for the medical or religious needs of prisoners of war, medical personnel and chaplains must be repatriated at the earliest opportunity.

1316 **CHAPLAINS.** Chaplains engaged in ministering to the armed forces enjoy protected status equivalent to that of medical personnel. Medical personnel and chaplains should display the appropriate distinctive emblem when engaged in their respective medical and religious activities. Unlike medical personnel, chaplains need not be exclusively or even partially assigned to the wounded and sick to be entitled to protection. Article 1063, U.S. Navy Regulations, 1990, however, requires that they be engaged exclusively in religious duties. Further, to be accorded immunity they must be attached to the armed forces, not mere volunteers. Chaplains lose their

special status if they commit acts harmful to the enemy outside their humanitarian functions. Although not forbidden by international law, U.S. Navy chaplains are forbidden to carry arms by article 1204.1 of the Chaplains Manual. Enlisted religious program specialists have no such special status since they are not chaplains and the protected "staff" are limited to those administering medical units and establishments.

1317 THE SHIPWRECKED. Shipwrecked persons, whether military or civilian, may not be attacked. Shipwrecked persons include those in peril at sea or in other waters as a result of either sinking, grounding, or other damage to a vessel in which they are embarked, or of the downing or distress of an aircraft. The cause of the peril, whether the result of enemy action or nonmilitary causes, is immaterial. Following each naval engagement at sea, the belligerents are obligated to take all possible measures, consistent with the security of their forces, to search for and rescue the shipwrecked. Shipwrecked persons do not include combatant personnel engaged in amphibious, underwater, or airborne attacks who are proceeding ashore, unless they are clearly in distress and require assistance. In the latter case they may qualify as shipwrecked persons only if they cease all active combat activity and the enemy has an opportunity to recognize their condition of distress. Shipwrecked combatants falling into enemy hands become prisoners of war.

1318 PARACHUTISTS. Parachutists descending from disabled aircraft may not be attacked while in the air and, unless they land in territory controlled by their own forces or engage in combatant acts while descending, must be provided an opportunity to surrender upon reaching the ground. Airborne troops, special warfare infiltrators, and intelligence agents parachuting into combat areas or behind enemy lines are not so protected and may be attacked in the air as well as on the ground. Such personnel may not be attacked, however, if they indicate their intention to surrender.

1319 PRISONERS OF WAR (POW). Combatants cease to be subject to attack when they have individually laid down their weapons to surrender, when they are no longer capable of resistance, or when the unit in which they are serving or embarked has surrendered or been captured. Combatants that have surrendered or otherwise fallen into enemy hands are entitled to POW status and, as such, must be treated humanely and protected against violence, intimidation, insult, and public curiosity. When POWs are given medical treatment, no distinction among them will be based on any grounds other than medical considerations. POWs may be interrogated upon capture but are only required to disclose their name, rank, date of birth, and military serial number. POW issues are discussed in more detail below.

1320 INTERNED PERSONS. Enemy civilians falling under the control of a belligerent may be interned if security considerations make it absolutely necessary to do so. Civilians sentenced for offenses committed in occupied territory may also be ordered into internment in lieu of punishment. Enemy civilians may not

be interned as hostages. Interned persons may not be removed from the occupied territory in which they reside unless their own security or imperative military reasons dictate. All interned persons must be treated humanely and may not be subjected to collective punishment nor reprisal action.

1321 PROTECTIVE SIGNS AND SYMBOLS

A. The Red Cross and Red Crescent. A red cross on a white field is the internationally accepted symbol of protected medical and religious persons and activities. Moslem countries use a red crescent on a white field for the same purpose. Israel uses the Red Star of David. All medical and religious persons or objects recognized as being so marked are to be treated with care and protection.

B. Other Protective Symbols. Other protective symbols specially recognized by international law include an oblique red band on a white background to designate hospital zones and safe havens for noncombatants. POW camps are marked by the letters "PW" or "PG"; civilian internment camps with the letters "IC." A royal-blue diamond and royal-blue triangle on a white shield is used to designate cultural buildings, museums, historic monuments, and other cultural objects that are exempt from attack. In the Western Hemisphere, a red circle with triple red spheres in the circle, on a white background (the "Roerich Pact" symbol) is used for that purpose.

1. Two protective symbols established by the 1977 Protocols Additional to the Geneva Conventions of 1949, to which the United States is not a party, are described as follows for informational purposes only. Works and installations containing forces potentially dangerous to the civilian population, such as dams, dikes, and nuclear power plants, may be marked three bright orange circles of equal size on the same axis. Civil defense facilities and personnel may be identified by an equilateral blue triangle on an orange background.

2. The 1907 Hague Symbol. The 1907 Hague symbol, established by the 1907 Hague Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX), is used to mark sacred edifices, hospitals, historic monuments, cultural buildings, and other structures protected from naval bombardment. The symbol consists of a rectangular panel divided diagonally into two triangles, the upper black, the lower white.

3. The White Flag. Customary international law recognizes the white flag as symbolizing a request to cease-fire, negotiate, or surrender. Enemy forces displaying a white flag should be permitted an opportunity to surrender or to communicate a request for cease-fire or negotiation.

C. Permitted Use. Protective signs and symbols may be used only to identify personnel, objects, and activities entitled to the protected status which they designate. Any other use is forbidden.

D. Failure to Display. When objects or persons are readily recognizable as being entitled to protected status, the lack of protective signs and symbols does not render an otherwise protected object or person a legitimate target. Failure to use protective signs and symbols may, however, subject protected person and objects to the risk of not being recognized by the enemy as having protected status.

1322 **PROTECTIVE SIGNALS.** Three optional methods of identifying medical units and transports have been created internationally. U.S. hospital ships and medical aircraft do not use these signals.

A. Radio Signals. For the purpose of identifying medical transports by radio telephone, the words PAN PAN are repeated three times followed by the word "medical" pronounced as MAY-DEE-CAL. Medical transports are identified in radio telegraph by three repetitions of the group XXX followed by the single group YYY.

B. Visual Signal. On aircraft, the flashing blue light may be used only on medical aircraft. Hospital ships, coastal rescue craft and medical vehicles may also use the flashing blue light. Only by special agreement between the parties to the conflict may its use be reserved exclusively to those forms of surface medical transport.

C. Electronic Identification. Medical ships and craft may be identified and located by means of appropriate standard maritime radar transponders as established by special agreement of the parties to the conflict. Medical aircraft may be identified and located by use of the secondary surveillance radar (SSR) specified in Annex 10 to the ICAO Convention. The SSR mode and code is to be reserved for the exclusive use of the medical aircraft.

1323 **IDENTIFICATION OF NEUTRAL PLATFORMS.** Ships and aircraft of nations not party to an armed conflict may use certain signals for self-identification, location, and establishment of communications. Use of these signals does not confer or imply recognition of any special rights or duties of neutrals or belligerents, except as may otherwise be agreed between them.

THE LAW OF NEUTRALITY

1324 **THE LAW OF NEUTRALITY.** The law of neutrality defines the legal relationship between nations engaged in an armed conflict (belligerents) and nations seeking to avoid direct involvement in such hostilities (neutrals). The law of neutrality serves to localize war, to limit the conduct of war on both land and sea, and to lessen the impact of war on international commerce. Despite the uncertainties and volatility of modern war, the law of neutrality continues to serve an important

role in containing the spread of hostilities, in regulating the conduct of belligerents with respect to nations not participating in the conflict, and in reducing the harmful effects of such hostilities on international commerce.

A. Neutral Status. In the absence of an international commitment to the contrary, all nations may refrain from participating in an armed conflict by declaring or assuming neutral status. The law of armed conflict reciprocally imposes duties and confers rights upon neutral nations and upon belligerents. The principal right of the neutral nation is that of inviolability; its principal duties are those of abstention and impartiality. The belligerent is obliged to respect the status and may demand the duties be observed. Once established, neutral status remains in effect until the neutral nation abandons its neutral stance and enters the conflict.

B. Neutrality Under the U.N. Charter. In the event of a threat to or breach of the peace, the Security Council is empowered by the U.N. Charter to take enforcement action on behalf of all member nations. When called upon by the Security Council to do so, the member nations are obligated to provide assistance to the United Nations in any action it takes, thereby overriding the nation's option to remain neutral. Should the Security Council determine not institute enforcement action, or is unable to do so due to the imposition of a veto by one or more of its permanent members, each United Nations member remains free to assert neutral status.

C. Neutrality Under Regional and Collective Self-Defense Arrangements. The inherent right of individual and collective self-defense may be implemented individually or through regional and collective security arrangements. The possibility of asserting and maintaining neutral status under such arrangements depends upon the extent to which the parties are obligated to provide assistance in a regional action, or in the case of collective self-defense, to come to the aid of a victim of an armed attack.

1325 **NEUTRAL TERRITORY.** As a general rule of international law, all acts of hostility in neutral territory, including neutral lands, neutral waters, and neutral airspace, are prohibited. A neutral nation has the duty to prevent the use of its territory as a place of sanctuary or a base of operations by belligerent forces of any side. If the neutral nation is unable or unwilling to enforce effectively its right of inviolability, an aggrieved belligerent may resort to acts of hostility in neutral territory against enemy forces making unlawful use of that territory. Belligerents are also authorized to act in self-defense when attacked or threatened with attack while in neutral territory or when attacked or threatened from neutral territory.

A. Neutral Lands. Belligerents are forbidden to move troops or war materials and supplies across neutral land territory. Belligerent troops that enter neutral territory must be disarmed and interned until the end of the armed conflict. A neutral may authorize passage through its territory of wounded and sick belonging

to the armed forces of either side on condition that the vehicles transporting them carry neither combatants nor materials of war. If permitted, the neutral nation assumes responsibility for providing for their safety and control. Prisoners of war that have escaped their captors and made their way to neutral territory may be either repatriated or left at liberty in the neutral nation, but must not be allowed to take part in belligerent activities while there.

B. Neutral Ports and Roadsteads. Although neutral nations may, on a nondiscriminatory basis, close their ports and roadsteads to belligerents, they are not obliged to do so. Vessels enjoy a 24-hour grace period in neutral ports at the outbreak of armed conflict. Thereafter, belligerent vessels may visit only those neutral ports and roadsteads that the neutral nation may choose to open to them for that purpose. Belligerent vessels, including warships, retain a right of entry in distress whether caused by force majeure or damage resulting from enemy action.

1. Limitations on Stay and Departure. In the absence of special provisions to the contrary in the laws or regulations of the neutral nation, belligerent warships are forbidden to remain in a neutral port or roadstead in excess of 24 hours. This restriction does not apply to belligerent vessels devoted exclusively to humanitarian, religious, or nonmilitary scientific purposes or warships unable to leave for reasons of weather or unseaworthiness. The neutral nation must intern a belligerent warship, together with its officers and crew, that will not or cannot depart a neutral port or roadstead where it is not entitled to remain.

2. Multiple Belligerent Vessels. Unless the neutral nation has adopted laws or regulations to the contrary, no more than three warships of any one belligerent nation may be present in the same neutral port or roadstead at any one time. When warships of opposing belligerent nations are present in a neutral port or roadstead at the same time, not less than 24 hours must elapse between the departure of the respective enemy vessels. The order of departure is determined by the order of arrival unless an extension of stay has been granted.

3. War Materials, Supplies, Communications, and Repairs. Warships may not make use of neutral ports or roadsteads to replenish or increase their supplies of war materials or their armaments, or to erect any apparatus for communicating with belligerent forces. They may, however, take on food and fuel, subject to the principle of nondiscrimination and the prohibition against the use of neutral territory as a base of operations. Warships may carry out such repairs as are absolutely necessary to render them seaworthy. They may not add to or repair weapons systems or enhance any other aspect of their war fighting capability.

C. Neutral Waters

1. Internal Waters. Neutral internal waters encompass those waters of a neutral nation that are landward of the baseline from which the

territorial sea is measured. The rules governing neutral ports and roadsteads apply as well to neutral internal waters.

2. Territorial Seas. Neutral territorial seas, like neutral territory generally, must not be used by belligerent forces either as a sanctuary from their enemies or as a base of operations. Belligerents are obliged to refrain from all acts of hostility in neutral territorial waters except those necessitated by self-defense or undertaken as self-help enforcement actions against enemy forces that are in violation of the neutral status of those waters when the neutral nation cannot or will not enforce their inviolability.

3. Mere Passage. A neutral nation may, on a nondiscriminatory basis, close its territorial waters, except in international straits, to belligerent vessels. When properly notified of its closure, belligerents are obliged to refrain from entering a neutral territorial sea except to transit through international straits or as necessitated by distress. A neutral nation may, however, allow the "mere passage" of belligerent vessels, including warships and prizes, through its territorial waters. To qualify, such passage must be innocent in nature and, in the absence of special laws or regulations of the neutral nation to the contrary, must not exceed 24 hours in duration and subject to the same restrictions as when in neutral ports. Neutral nations customarily authorize passage through their territorial sea of ships carrying the wounded, sick, and shipwrecked, whether or not those waters are otherwise closed to belligerent vessels.

4. Neutral Straits. Belligerent and neutral surface ships, submarines, and aircraft have a right of transit passage through, over, and under all straits used for international navigation. Neutral nations cannot suspend or impede this right of transit passage through international straits. Belligerent forces transiting through international straits overlapped by neutral waters must proceed without delay, must refrain from the threat or use of force against the neutral nation, and must otherwise refrain from acts of hostility and other activities not incident to their transit. Belligerent forces in transit may, however, take defensive measures consistent with their security, including the launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance. Belligerents may not use neutral straits as a place of sanctuary or a base of operations; nor may they exercise visit and search rights in those waters.

5. Neutral Archipelagic Waters. Belligerent forces must refrain from acts of hostility in neutral archipelagic waters and from using them as a sanctuary or a base of operations. Belligerent ships or aircraft, including submarines, surface warships, and military aircraft, retain the right of unimpeded archipelagic sea lanes passage through, over, and under neutral archipelagic sea lanes. Belligerent forces exercising the right of archipelagic sea lanes passage may engage in those activities that are incident to their normal mode of continuous and expeditious passage and are consistent with their security. Visit and search is not authorized in

neutral archipelagic waters.

D. Neutral Airspace. Neutral territory extends to the airspace over a neutral nation's lands, internal waters, archipelagic waters (if any) and territorial sea. Belligerent military aircraft are forbidden to enter neutral airspace with the following exceptions:

1. The airspace above neutral international straits and archipelagic sea lanes remains open at all times to belligerent aircraft, including armed military aircraft, engaged in transit or archipelagic sea lanes passage. Such passage must be continuous and expeditious and must be undertaken in the normal mode of flight of the aircraft involved. Belligerent aircraft must refrain from acts of hostility while in transit but may engage in activities that are consistent with their security and the security of accompanying surface and subsurface forces.

2. Unarmed military aircraft may enter neutral airspace under such conditions and circumstances as the neutral nation may wish to impose impartially on the belligerents. Should such unarmed aircraft penetrate neutral airspace without permission, or otherwise fail to abide by the entry conditions imposed upon them by the neutral nations, they may be interned together with their crews.

3. Medical aircraft may overfly neutral territory, may land there in case of necessity, and may use neutral airfield facilities as ports of call, subject to such nondiscriminatory restrictions as the neutral nation may see fit to apply.

4. Belligerent aircraft in evident distress are permitted to enter neutral airspace and to land in neutral territory under such safeguards as the neutral nation may wish to impose. The neutral nation may require such aircraft to land, may intern both aircraft and crew, or may impose nondiscriminatory conditions upon their stay or release.

1326 **NEUTRAL COMMERCE**. A principal purpose of the law of neutrality is the regulation of belligerent activities with respect to neutral commerce. Neutral commerce comprises all commerce between one neutral nation and another not involving materials of war or armaments destined for a belligerent nation, and all commerce between a neutral nation and a belligerent that does not involve the carriage of contraband or otherwise sustain the belligerent's war-fighting capability. Neutral merchant vessels and nonpublic civil aircraft engaged in legitimate neutral commerce are subject to visit and search, but may not be captured or destroyed by belligerent forces.

A. Commerce Between Neutrals and Belligerents. The law of neutrality does not prohibit neutral nations from engaging in commerce with belligerent nations. A neutral nation cannot, however, supply materials of war or armaments to a belligerent without violating its neutral duties of abstention and impartiality and

risking loss of its neutral status. Although a neutral may forbid its citizens from carrying on non-neutral commerce with belligerent nations, it is not obliged to do so.

B. Contraband. Contraband consists of goods which are destined for the enemy of a belligerent and which may be useful in armed conflict. Traditionally, contraband has been divided into two categories: "absolute," i.e., those goods with obvious combat utility and "conditional," i.e., goods equally useful for combat or peaceful purposes. The practice of belligerents in World War II has cast doubt on the relevance, if not the validity, of the traditional distinction.

1. Enemy Destination. The distinction between absolute and conditional contraband has continuing relevance with respect to the rules pertaining to the presumption of ultimate enemy destination. The enemy destination of conditional contraband must be factually established. Goods consisting of absolute contraband are liable to capture at any place beyond neutral territory if destined, directly or indirectly, for the enemy. When absolute contraband is involved, a destination of enemy owned or occupied territory may be presumed when:

- a. The neutral vessel is to call at an enemy port before arriving at neutral port for which the goods are documented;
- b. The goods are documented to a neutral port serving as a port of transit to an enemy, even though they are consigned to a neutral; or
- c. The goods are consigned "to order" or to an unnamed consignee, but are destined for a neutral nation in the vicinity of enemy territory.

2. Exemptions to Contraband. Certain goods are exempt from capture as contraband even though destined for enemy territory:

- a. Exempt or "free goods," i.e., goods not susceptible for use in armed conflict;
- b. Articles intended exclusively for the treatment of wounded and sick members of the armed forces and for prevention of disease;
- c. Medical and hospital stores, religious objects, clothing, bedding, essential foodstuffs, and means of shelter for the civilian population in general, and women and children in particular, provided there is not serious reason to believe

that such goods will be diverted to other purpose, or that a definite military advantage would accrue to the enemy by their substitution for enemy goods that would thereby become available for military purposes;

- d. Items destined for POWs, including individual parcels and collective relief shipments containing food, clothing, medical supplies, religious objects, and educational, cultural, and athletic articles; and
- e. Goods otherwise specifically exempted from capture by arrangement between belligerents.

1327 **ACQUIRING ENEMY CHARACTER.** All vessels operating under an enemy flag, and all aircraft bearing enemy markings, possess enemy character. The converse is not true: Any vessel or aircraft owned or controlled by a belligerent possesses enemy character, regardless of whether it is operating under a neutral flag or bears neutral markings. Vessels and aircraft acquiring enemy character may be treated by an opposing belligerent as if they are enemy vessels and aircraft.

A. Acquiring the Character of an Enemy Warship or Military Aircraft.
Neutral vessels and aircraft, other than warships and military aircraft, acquire enemy character and may be treated by a belligerent as enemy warships and military aircraft when it takes a direct part in the hostilities on the side of the enemy or acts in any capacity as a naval or military auxiliary to the enemy's armed forces.

B. Acquiring the Character of an Enemy Merchant Vessel or Aircraft.
Neutral vessels and aircraft, other than warships and military aircraft, acquire enemy character and may be treated by a belligerent as enemy merchant vessels or aircraft when: they operate directly under enemy control, orders, charter, employment, or direction; or resist an attempt to establish identity, including visit and search.

1328 **VISIT AND SEARCH.** Visit and search is the means by which a belligerent warship or military aircraft may determine: the enemy or neutral character of merchant ships encountered outside neutral territory; the contraband or exempt character of their cargo; the innocent or hostile manner of their employment; and other facts bearing on their relation to the armed conflict.

A. Prohibitions. Warships are not subject to visit and search. The prohibition against visit and search in neutral territory extends to international straits overlapped by neutral territorial seas and archipelagic sea lanes. Neutral vessels engaged in government noncommercial service may not be subjected to visit and search. Neutral merchant vessels under convoy of neutral warships of the same

nationality are also exempt from visit and search, although the convoy commander may be required to provide in writing to the commanding officer of an intercepting belligerent warship information as to the character of the vessels and of their cargoes which could otherwise be obtained by visit and search.

B. Procedure for Visit and Search. In the absence of specific ROE or other special instructions, U.S. Navy warships should comply with the following procedure when exercising the belligerent right of visit and search:

1. Visit and search should be exercised with all possible tact and consideration.
2. Before summoning a vessel to lie to, the warship should hoist its national flag. The summons is made by firing a blank charge, by international flag signal (SN or SQ), or by other recognized means. The summoned vessel, if a neutral merchant ship, is bound to stop, lie to, display her colors, and not resist. (If the summoned vessel is an enemy ship, it is not so bound and may legally resist, even by force, but thereby assumes all risk of resulting damage or destruction.)
3. If the summoned vessel takes flight, she may be pursued and brought to by forcible measures if necessary.
4. When a summoned vessel has been brought to, the warship should send a boat with an officer to conduct the visit and search. If practicable, a second officer should accompany the officer charged with the examination. The officer(s) and boat crew may be armed at the discretion of the commanding officer.
5. If visit and search at sea is deemed hazardous or impracticable, the neutral vessel may be escorted by the summoning of another U.S. Navy warship or by a U.S. military aircraft to the nearest place (outside neutral territory) where the visit and search may be conveniently and safely conducted. The neutral vessel is not obliged to lower her flag (she has not been captured) but must proceed according to the orders of the escorting warship or aircraft.
6. The boarding officer should first examine the ship's papers to ascertain her character, ports of departure and destination, nature of cargo, manner of employment, and other facts deemed pertinent. Papers to be examined will ordinarily include a certificate of national registry, crew list, passenger list, logbook, bill of health clearances, charter party (if chartered), invoices or

manifests of cargo, bills of lading, and on occasion, a consular declaration or other certificate of noncontraband carriage certifying the innocence of the cargo.

7. Regularity of papers and evidence of innocence of cargo, employment, or destination furnished by them are not necessarily conclusive, and, should doubt exist, the ship's company may be questioned and the ship and cargo searched.
8. Unless military security prohibits, the boarding officer will record the facts concerning the visit and search in the logbook of the visited ship, including the date and position of the interception. The entry should be authenticated by the signature and rank of the boarding officer, but neither the name of the visiting warship nor the identity of her commanding officer should be disclosed.

C. Visit and Search by Military Aircraft. Although aircraft have a right of visit and search, no established international practice has developed. Ordinarily, visit and search of a vessel by an aircraft is accomplished by directing and escorting the vessel to the vicinity of a belligerent warship, which will carry out the visit and search, or to a belligerent port. Visit and search of an aircraft by an aircraft may be accomplished by directing the aircraft to proceed under escort to the nearest convenient belligerent landing area.

1329 **BLOCKADE.** Blockade is a belligerent operation to prevent vessels and/or aircraft of all nations, enemy as well as neutral, from entering or exiting specified ports, airfields, or coastal areas under the control of an enemy nation. A belligerent's purpose in establishing a blockade is to deny the enemy the use of enemy and neutral vessels or aircraft to transport personnel and goods to or from enemy territory.

A. Other Measures Distinguished. Unlike the belligerent right of visit and search, which is designed to interdict the flow of contraband goods into enemy territory and which may be exercised anywhere outside of neutral territory, the belligerent right of blockade is intended to prevent vessels and aircraft from crossing an established and publicized cordon separating the enemy from international waters and or airspace. Unlike a blockade, quarantine is not a belligerent act. A quarantine only becomes offensive if an attempt is made at running prohibited items through the quarantine. A quarantine only prohibits the entry of certain items. Ships and aircraft carrying prohibited items are simply turned back or diverted to unaffected ports; they are not seized as prizes. Ships and aircraft not carrying prohibited items are permitted to pass.

B. Requirements. To be valid under the traditional rules of international law, a blockade must conform to the following criteria:

1. Establishment. A blockade must be established by the government of the belligerent nation. This is usually accomplished by a declaration of the belligerent government or by the commander of the blockading force acting on behalf of his government. The declaration should include, as a minimum, the date the blockade is to begin, its geographic limits, and the grace period granted neutral vessels and aircraft to leave the area to be blockaded.

2. Notification. It is customary for the belligerent nation establishing the blockade to notify all affected nations of its imposition. Because knowledge of the existence of a blockade is an essential element of the offenses of breach and attempted breach of blockade, neutral vessels and aircraft are always entitled to notification. The commander of the blockading forces will usually also notify local authorities in the blockaded area. The form of the notification is not material so long as it is effective.

3. Effectiveness. To be valid, a blockade must be effective. To be effective, it must be maintained by a surface, air, or subsurface force or other mechanism that is sufficient to render entry or exit of the blockaded area dangerous. The requirement of effectiveness does not preclude temporary absence of the blockading force. Nor does effectiveness require that every possible avenue of approach to the blockaded area be covered.

4. Impartiality. A blockade must be applied impartially to the vessels and aircraft of all nations.

C. Limitations. A blockade must not bar access to or departure from neutral ports and coasts. Neutral nations retain the right to engage in neutral commerce that does not involve trade or communications originating in or destined for the blockaded area. Although neutral warships and military aircraft enjoy no positive right of access to blockaded areas, the belligerent imposing the blockade may authorize their entry and exit.

1330 BELLIGERENT CONTROL OF THE IMMEDIATE AREA OF NAVAL OPERATIONS.

Within the immediate area or vicinity of naval operations, a belligerent may establish special restrictions on the activities of neutral vessels and aircraft and may prohibit altogether such vessels and aircraft from entering the area. The immediate area or vicinity of naval operations is that area within which hostilities are taking place or belligerent forces are actually operating. A belligerent may not, however, purport to deny access to neutral nations, or to close an international strait to neutral shipping, pursuant to this authority unless another route of similar convenience remains open to neutral traffic. Similarly, the commanding officer of a belligerent warship may exercise control over the communication of any neutral merchant vessel or civil aircraft whose presence in the immediate area of naval operations might otherwise endanger or jeopardize those

operations.

1331 CAPTURE OF NEUTRAL VESSELS AND AIRCRAFT.

Neutral merchant vessels and civil aircraft are liable to capture by belligerent warships and military aircraft if engaged in activities which constitute abandonment of their neutral character. Captured vessels and aircraft are sent to a port or airfield under belligerent jurisdiction as prize for adjudication by a prize court. Ordinarily, a belligerent warship will place a prize master and prize crew on board a captured vessel for this purpose. Prizes may not be brought into neutral ports. Article 630.23 of OPNAVINST 3120.32B, Standard Organization and Regulations of the U.S. Navy, sets forth the duties and responsibilities of commanding officers and prize masters concerning captured vessels. Neutral vessels or aircraft attempting to resist proper capture lay themselves open to forcible measures by belligerent warships and military aircraft and assume all risk of resulting damage. Every reasonable effort should be made to avoid destruction of captured neutral vessels and aircraft. If destruction of the prize is necessary, the capturing officer must provide for the safety of the passengers, crew and all documents and papers relating to the prize. The officers and crews of captured neutral merchant vessels and civil aircraft who are nationals of a neutral nation must be repatriated as soon as circumstances reasonably permit, unless they took an active part in the hostilities justifying their internment as POWs. Enemy nationals do not become POWs unless engaged in the service of the enemy.

1332 **BELLIGERENT PERSONNEL INTERNED BY A NEUTRAL NATION.** International law recognizes that neutral territory, being outside the region of war, offers a place of asylum to members of belligerent forces and as a general rule requires the neutral government concerned to prevent the return of such persons to their own forces. The neutral nation must accord equal treatment to the personnel of all the belligerent forces. With respect to aircrews of belligerent aircraft that land in neutral territory whether intentionally or inadvertently, the neutral nation should usually intern them.

CONVENTIONAL WEAPONS AND WEAPONS SYSTEMS

1333 **CONVENTIONAL WEAPONS GENERALLY.** This section addresses the legal considerations pertaining to the use of conventional weapons and weapons systems. The right of nations engaged in armed conflict to choose methods or means of warfare is not unlimited. This rule of law is expressed in the concept that the employment of weapons, material, and methods of warfare that are designed to cause superfluous injury or unnecessary suffering is prohibited. As a corollary, weapons which by their nature are incapable of being directed specifically against military objects, and therefore indiscriminately put noncombatants at equivalent risk,

are forbidden. A few weapons, such as poisoned projectiles, are unlawful no matter how employed. Others may be rendered unlawful by alteration, such as by coating ammunition with a poison. Still others may be unlawfully employed, such as setting armed contact naval mines adrift so as to endanger innocent as well as enemy shipping. And finally, any weapon may be set to an unlawful purpose when it is directed against noncombatants and other protected persons and property.

1334 UNNECESSARY SUFFERING. Antipersonnel weapons are designed to kill or disable enemy combatants and are lawful notwithstanding the death, pain, and suffering they inflict. Weapons that are designed to cause unnecessary suffering or superfluous injury, however, are prohibited because the damage they produce is needlessly disproportionate to the military advantage to be gained by their use. Poisoned projectiles and dum-dum bullets, for example, are prohibited because there is little military advantage to be gained by ensuring the death of wounded personnel through poisoning or the expanding effect of unjacketed lead ammunition. Similarly, the law prohibits the use of projectile materials that are difficult or impossible to find in the people they wound using field x-ray equipment. These projectiles, e.g., glass or clear plastic, unnecessarily inhibit the treatment of wounds.

1335 INDISCRIMINATE EFFECT. Indiscriminate weapons, i.e., those weapons incapable of being controlled so as to be directed against a military target, are forbidden. A weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained. An artillery round capable of being directed with a reasonable degree of accuracy at a military target is not an indiscriminate weapon simply because it may miss its mark or inflict collateral damage. Conversely, uncontrolled balloon-borne bombs, drifting armed contact mines, and long-range unguided missiles are examples of weapons which lack that capability of direction and are, therefore, unlawful.

1336 NAVAL MINES. Naval mines have been effectively employed for area denial, coastal and harbor defense, antisurface and antisubmarine warfare, and blockade. Naval mines may be "armed" or "controlled." Armed mines are either emplaced with all safety devices withdrawn, or are armed following emplacement, so as to detonate when preset parameters (if any) are satisfied. Controlled mines have no destructive capability until activated by some controlled arming order which makes them armed mines. Naval mines are lawful weapons, but their potential for indiscriminate effects has led to specific regulation of their deployment and employment by the law of armed conflict.

A. Peacetime Mining.

1. In Territorial Seas. Consistent with the safety of its own citizenry, a nation may emplace both armed and controlled mines in its own internal

waters at any time with or without notification. A nation may also mine its own archipelagic waters and territorial sea during peacetime when deemed necessary for national security purposes. If armed mines are emplaced in archipelagic waters or the territorial sea, appropriate international notification of the existence and location of such mines is required. Because the right of innocent passage can be suspended only temporarily, armed mines must be removed or rendered harmless as soon as the security threat that prompted their emplacement has passed. Emplacement of controlled mines in a nation's own archipelagic waters or territorial sea is not subject to such notification or removal requirements. Naval mines may not be emplaced in the internal, territorial, or archipelagic waters of another nation in peacetime without that nation's consent.

2. Controlled Mines in International Waters. Controlled mines may be emplaced in international waters beyond the territorial sea subject only to the requirement that they do not unreasonably interfere with other lawful uses of the oceans. The determination of what constitutes an "unreasonable interference" involves a balancing of a number of factors including the rationale for their emplacement (i.e., the self-defense requirements of the emplacing nation), the extent of the area to be mined, the hazard (if any) to other lawful ocean uses, and the duration of their emplacement. Because controlled mines do not constitute a hazard to navigation, international notice of their emplacement is not required.

3. Armed Mines in International Waters. Armed mines may not be emplaced in international waters prior to the outbreak of armed conflict, except under the most demanding requirements of individual or collective self-defense. Under such circumstances, prior notification of their location and the anticipated date of their complete removal must be stated. The nation emplacing armed mines in international waters during peacetime also assumes responsibility to maintain an on-scene presence in the area sufficient to warn ships approaching the danger area. All armed mines must be expeditiously removed or rendered harmless when the imminent danger that prompted their emplacement has passed.

B. Mining During Armed Conflict. Naval mines may be lawfully employed by parties to an armed conflict subject to the following restrictions:

1. International notification of the location of emplaced armed mines must be made as soon as military exigencies permit;
2. Belligerents may not mine neutral waters;
3. Anchored mines must become harmless as soon as they have broken their moorings;
4. Unanchored mines not otherwise affixed or imbedded in the bottom must become harmless

within an hour after loss of control over them;

5. The location of minefields must be carefully recorded to ensure accurate notification and to facilitate subsequent removal and/or deactivation;
6. Naval mines may be employed to channelize neutral shipping but not in a manner to impede the transit passage of international straits or archipelagic sea lanes passage of archipelagic waters by such shipping;
7. Naval mines may not be emplaced off the coasts and ports of the enemy with the sole objective of intercepting commercial shipping, but may otherwise be employed in the strategic blockade of enemy ports, coasts, and waterways; and
8. Mining of areas of indefinite extent in international waters is prohibited. Mines may establish reasonably limited barred areas, provided neutral shipping retains an alternate route around or through such an area with reasonable assurance of safety.

1337 **TORPEDOES.** Torpedoes which do not become harmless when they have missed their mark constitute a danger to innocent shipping and are therefore unlawful. All U.S. Navy torpedoes are designed to sink to the bottom and become harmless upon completion of their propulsion run.

1338 **CLUSTER AND FRAGMENTATION WEAPONS.** Cluster and fragmentation weapons are projectiles, bombs, missiles, and grenades that are designed to fragment prior to or upon detonation, thereby expanding the radius of their lethality and destructiveness. These weapons are lawful when used against combatants. When used in proximity to noncombatants or civilian objects, their employment should be carefully monitored to ensure that collateral civilian casualties or damage are not excessive in relation to the legitimate military advantage sought.

1339 **DELAYED ACTION DEVICES.** Booby traps and other delayed action devices are not unlawful, provided they are not designed or employed to cause unnecessary suffering. Devices that are designed to simulate items likely to attract and injure noncombatants (e.g., toys) are prohibited. Similarly, booby traps cannot be attached to protected persons or objects, e.g., the wounded and sick, dead bodies, or medical facilities and supplies.

1340 **INCENDIARY WEAPONS.** Incendiary devices, such as tracer ammunition, thermite bombs, flame throwers, napalm, and other incendiary weapons and agents, are lawful weapons. Incendiary devices should be employed in a manner

that minimizes uncontrolled or indiscriminate effects on the civilian population consistent with mission accomplishment and force security.

1341 **OVER THE HORIZON WEAPONS SYSTEMS.** Missiles and projectiles dependent upon over-the-horizon or beyond visual range guidance systems are lawful, provided they are equipped with sensors, or are employed in conjunction with external sources of targeting data, that are sufficient to ensure effective target discrimination.

1342 **LEGAL REVIEW.** Per DoD policy, all weapons newly developed or purchased by the U.S. armed forces must be reviewed for consistency with international law. For the Navy, these reviews are conducted by JAG before the engineering development stage of the acquisition process, and before the initial contract for production is let. For further information see SECNAVINST 5711.8 (series).

NUCLEAR, CHEMICAL, AND BIOLOGICAL WEAPONS

1343 **NBC WEAPONS GENERALLY.** Nuclear, chemical, and biological weapons present special law-of-armed-conflict problems due to their potential for indiscriminate effects and unnecessary suffering. This section addresses legal considerations pertaining to the development, possession, deployment, and employment of these weapons.

1344 **NUCLEAR WEAPONS.** No rules of customary or conventional international law prohibit nations from employing nuclear weapons in armed conflict. Employment of nuclear weapons is, however, subject to the following fundamental principles of the law of armed conflict: the right to adopt means of injuring the enemy is not unlimited; attacks against the civilian population as such may not be launched; and the distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible. The decision to authorize the use of U.S. nuclear weapons rests solely with the President. Nuclear weapons are regulated by a number of arms control agreements restricting their development, deployment, and use. Some of these agreements (e.g., the 1963 Nuclear Test Ban Treaty) may not apply during time of war.

A. Seabed Arms Control Treaty. This multilateral convention prohibits emplacement of nuclear weapons on the seabed and the ocean floor beyond a 12-nautical mile coastal zone measured from the baseline of the territorial sea. The prohibition extends to structures, launching installations, and other facilities specifically designed for storing, testing, or using nuclear weapons. This treaty

prohibits emplacement of nuclear mines on the seabed and ocean floor or in the subsoil thereof. It does not, however, prohibit the use of nuclear weapons in the water column that are not so affixed to the seabed (e.g., nuclear armed depth charges and torpedoes).

B. Outer Space Treaty. This multilateral convention prohibits the placement, installation, or stationing of nuclear weapons or other weapons of mass destruction in earth orbit, on the moon or other celestial bodies, or in outer space. Suborbital missile systems are not included in this prohibition.

C. Antarctic Treaty. The Antarctic Treaty is a multilateral convention designed to ensure that Antarctica, defined to include the area south of 60 degrees S latitude, is used for peaceful purposes only. The treaty prohibits in Antarctica "any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons." Nuclear explosions are specifically prohibited. Ships and aircraft at points of discharging personnel or cargoes in Antarctica are subject to international inspection. Ships and aircraft operating on and over the high seas within the treaty area are not subject to these prohibitions. For a detailed discussion of the Antarctic Treaty in general, see Hinkley, *Protecting American Interests in Antarctica*, 39 Naval L. Rev. 43 (1990).

D. Treaty of Tlatelolco. This treaty is an agreement among the Latin American countries not to introduce nuclear weapons into Latin America. The treaty does not, however, prohibit Latin American nations from authorizing nuclear armed ships and aircraft of nonmember nations to visit their ports and airfields or to transit through their territorial seas or airspace. The treaty is not applicable to the power system of any vessel. Under Protocol I to the treaty, the Netherlands, the U.K., and the U.S. have agreed to abide by the denuclearization provisions of the treaty. Consequently, the U.S. cannot maintain nuclear weapons in Guantanamo Bay, Cuba; the Virgin Islands; and Puerto Rico. Protocol I nations retain the power to authorize transits and port visits by ships and aircraft of their own or other armed forces in their Protocol I territories, regardless of armament or cargo.

E. Nuclear Test Ban Treaty. This multilateral treaty prohibits the testing of nuclear weapons in the atmosphere, in outer space, and underwater. Over 100 nations are party to the treaty, including the U.S.S.R., the U.K., and the U.S. (France and China are not parties.) Underground testing of nuclear weapons is not included within the ban.

F. Non-Proliferation Treaty. This multilateral treaty obligates nations having nuclear weapons to refrain from transferring nuclear weapons or nuclear weapons technology to nations without them. Member nations without nuclear weapons agree to refrain from accepting such weapons from other nations or from manufacturing nuclear weapons themselves. The treaty does not apply in time of war.

G. Bilateral Nuclear Arms Control Agreements. The United States and the U.S.S.R. have concluded a number of bilateral agreements designed to restrain the growth of nuclear warheads and launchers and to reduce the risk of miscalculation that could trigger a nuclear exchange. Among these agreements are the Hotline Agreements of 1963 and 1971, the Accidents Measures Agreement of 1971, the 1973 Agreement on Prevention of Nuclear War, the Anti-Ballistic Missile Treaty of 1972 and its Protocol of 1974, the Threshold Test Ban Treaty of 1974, the 1976 Treaty on Peaceful Nuclear Explosions, the SALT Agreements of 1972 and 1977 (SALT I--Interim Agreement has expired; SALT II was never ratified), and the INF Treaty of 1988.

1345 **CHEMICAL WEAPONS.** Both customary and conventional international law prohibit the "first use" of lethal chemical weapons in armed conflict. The United States is a party to the 1925 Geneva Gas Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare ("the 1925 Gas Protocol"). All NATO nations and Warsaw Pact nations are parties. Most parties, including the United States, reserved the right to employ chemical weapons for retaliatory purposes. The 1925 Gas Protocol does not prohibit the development, production, testing, or stockpiling of chemical weapons. Similarly, equipping and training military forces for chemical warfare is permissible. The United States categorizes chemical weapons under three headings of lethal and incapacitating agents, riot control agents, and herbicidal agents.

A. Lethal and Incapacitating Agents. The United States considers the prohibition against first use of lethal and incapacitating chemical weapons to be part of customary international law and, therefore, binding on all nations whether or not they are parties to the 1925 Gas Protocol. Lethal chemical agents are those which cause immediate death; incapacitating agents are those producing symptoms that persist for appreciable periods of time after exposure. National Command Authorities (NCA) approval is required for retaliatory use of lethal or incapacitating chemical weapons by U.S. forces. Retaliatory use must stop as soon as the enemy use of such agents that prompted the retaliation has ceased and any tactical advantage gained by the enemy through unlawful first use has been redressed.

B. Riot Control Agents. Riot control agents are those gases, liquids, and analogous substances that are widely used by governments for civil law enforcement purposes, e.g., tear gas and Mace. Riot control agents, in all but the most unusual circumstances, cause effects that disappear within minutes after exposure.

1. During Armed Conflict. While opining that wartime use of riot control agents is not prohibited by the 1925 Gas Protocol, the United States has formally renounced first use of riot control agents in armed conflict except in defensive military modes to save lives. Use of riot control agents by U.S. forces in armed conflict requires NCA approval. Exec. Order No. 11,850; 3A C.F.R. §§ 149-50. Examples of authorized use of riot control agents in time of armed conflict include:

- a. Riot control situations in areas under effective U.S. military control, to include control of rioting prisoners of war;
- b. Rescue missions involving downed aircrews or escaping prisoners of war; and
- c. Protection of military supply depots, military convoys, and other military activities in rear echelon areas from civil disturbances, terrorist activities, or paramilitary operations.

2. During Peacetime. Employment of riot control agents in peacetime may be authorized by SECDEF, or in limited circumstances, by unified and specified commanders. Examples of authorized use of riot control agents in peacetime include:

- a. Civil disturbances and other law enforcement activities in the United States, its territories and possessions [SECNAVINST 5400.12 series];
- b. On U.S. bases, posts, embassy grounds, and installations overseas for protection and security purposes, including riot control;
- c. Off base overseas for law enforcement purposes specifically authorized by the host government; and
- d. Humanitarian evacuation operations involving U.S. or foreign nationals.

C. Herbicidal Agents. Herbicidal agents are gases, liquids, and analogous substances that are designed to defoliate trees, bushes, or shrubs, or to kill long grasses and other vegetation that could shield the movement of enemy forces. While opining that use of herbicidal agents in wartime is not prohibited by the 1925 Gas Protocol, the United States has formally renounced the first use of herbicides in time of armed conflict except for control of vegetation within U.S. bases and installations or around their immediate defensive perimeters. Use of herbicidal agents during armed conflict requires NCA approval. In peacetime, the use of herbicidal agents may be authorized by the SECDEF or, in limited circumstances, by unified and specified commanders.

1346 BIOLOGICAL WEAPONS. International law prohibits all biological weapons or methods of warfare whether directed against persons, animals, or plant life. Biological weapons include microbial or other biological agents or

toxins, natural and artificial. The United States has formally renounced the use of biological weapons under any circumstances. The United States considers the prohibition against the use of biological weapons during armed conflict to be part of customary international law and thereby binding on all nations, regardless of whether they are parties to the 1925 Gas Protocol (prohibiting their use) or the 1972 Biological Weapons Convention (prohibiting their production, testing, and stockpiling). The United States, the U.S.S.R., and most other NATO and Warsaw Pact nations are parties to both the 1925 Gas Protocol and the 1972 Biological Weapons Convention. Pursuant to its treaty obligations, the United States has destroyed all its biological and toxin weapons and restricts its research activities to development of defensive capabilities.

DECEPTION DURING ARMED CONFLICT

1347 **DECEPTION GENERALLY.** The law of armed conflict permits deceiving the enemy through stratagems and ruses of war intended to mislead him, to deter him from taking action, or to induce him to act recklessly, provided the ruses do not violate rules of international law applicable to armed conflict.

1348 **PERMITTED DECEPTIONS.** Stratagems and ruses of war permitted in armed conflict include such deceptions as camouflage; deceptive lighting; dummy ships, aircraft, and other armament; decoys; simulated forces; feigned attacks, withdrawals, operations, or other activities; surprise attacks, traps, and ambushes; false intelligence information; moving landmarks and route markers; electronic deceptions, and use of enemy codes, passwords, and countersigns. These and similar lawful deceptions can be used offensively or defensively.

1349 **PROHIBITED DECEPTIONS.** The use of unlawful deceptions is called "perfidy." Acts of perfidy are deceptions designed to invite the confidence of the enemy to lead him to believe that he is entitled to, or is obliged to accord, protected status under the law of armed conflict, with the intent to betray that confidence, e.g., feigning surrender to lure the enemy into a trap or the use by combatant aircraft of the electronic signal reserved exclusively for medical aircraft. Any deception which would invite the enemy to violate the law of armed conflict is unlawful. For example, it would be improper to spread false intelligence reports intended to induce the enemy to attack civilian objects in the mistaken belief that they are military objects. A false broadcast to the enemy that an armistice has been agreed upon has been widely recognized to be treacherous. It is not, however, perfidious to: use spies; encourage defection or insurrection among the enemy; or to encourage enemy combatants to desert, surrender or rebel.

1350 MISUSE OF PROTECTIVE SIGNS, SIGNALS, AND SYMBOLS.

The use of protective signs, signals, and symbols to injure, kill, or capture the enemy is prohibited. Such acts are perfidious because they undermine the effectiveness of protective signs, signals, and symbols and thereby jeopardize the safety of noncombatants and the immunity of protected structures and activities. For example, using an ambulance or medical aircraft marked with the red cross or red crescent to carry armed combatants, weapons, or ammunition with which to attack or elude enemy forces is prohibited. Similarly, use of the white flag to gain a military advantage over the enemy is unlawful. The white flag symbolizes a request to cease fire, negotiate or surrender. Displaying a white flag before attack to cause the enemy to cease firing is prohibited. The enemy is not required to cease firing or place its troops in jeopardy when a white flag is raised. To indicate that the hoisting is authorized by its commander, the appearance of the flag should be accompanied or followed promptly by a complete cessation of fire from that side. Further the commander hoisting the flag is expected to send a representative to negotiate.

1351 NEUTRAL FLAGS, INSIGNIA, AND UNIFORMS.

The use of false or deceptive markings to disguise belligerent military aircraft as being of neutral nationality is prohibited. Similarly, belligerents engaged in armed conflict on land are not permitted to use the flags, insignia, or uniforms of a neutral nation to deceive the enemy. Under the customary international law of naval warfare, however, a belligerent warship may fly false colors and disguise its outward appearance in other ways to deceive the enemy into believing the vessel is of neutral nationality or is not a warship. A warship can not, however, go into action without first showing her true colors. Nevertheless the use of these ruses by naval forces today may be politically sensitive, since using neutral emblems might lead a party erroneously to conclude that a neutral has given up its neutrality and entered the fighting on the other side. This could lead to an attack or declaration of war on the neutral.

1352 THE UNITED NATIONS FLAG AND EMBLEM.

The flag of the United Nations and the letters "UN" may not be used in armed conflict for any purpose without UN authorization. The UN flag is white on light blue; the letters "UN" are its emblem. The prohibition is extended to operations at sea as a matter of U.S. policy.

1353 ENEMY FLAGS, INSIGNIA, AND UNIFORMS

A. At Sea. Naval surface and subsurface forces may fly enemy colors and display enemy markings to deceive the enemy. Warships must, however, display their true colors prior to an actual armed engagement.

B. In the Air. Given the inability to change markings once airborne, the use in combat of enemy markings by belligerent military aircraft is prohibited.

Moreover, the speed of engagement precludes effective attempts to display true markings at the instant of attack.

C. On Land. Belligerent land forces of MAY use enemy flags, insignia, or uniforms to deceive the enemy either before or after, but NOT during, an armed engagement. Combatants risk loss of entitlement to prisoner-of-war status, however, if they are captured while displaying enemy colors or insignia or wearing enemy uniforms in combat. Downed aircrews and escaping prisoners of war, however, may use enemy uniforms to evade capture, so long as they do not attack enemy forces, gather military intelligence, or engage in similar military operations while so attired. Using foreign military uniforms or equipment in training to promote realism and recognition is permissible. As a general rule, enemy markings should be removed from captured enemy equipment before it is used in combat; unmarked or camouflaged captured material may be used immediately.

1354 **FEIGNING DISTRESS.** It is unlawful to feign distress through the false use of internationally recognized distress signals such as SOS and MAYDAY.

A. Wounded Combatants. A wounded combatant does not commit perfidy by calling for and receiving medical aid even though he may be intending immediately to resume fighting. Nor do medical personnel commit perfidy by rendering such aid.

B. Aerial Combatants. In air warfare, however, it is permissible to feign disablement or other distress as a means to induce the enemy to break off an attack. Consequently, there is no obligation in air warfare to cease attacking a belligerent military aircraft that appears to be disabled. By analogy, the practice of submarines in releasing oil and debris to feign success of a depth charge or torpedo attack has never been considered to be unlawful. However, if one KNOWS the enemy aircraft is disabled such as to permanently remove it from the conflict (e.g., major fire or structural damage), combatants are obligated to cease attacking to permit possible evacuation by crew or passengers.

1355 **FALSE CLAIMS OF NONCOMBATANT STATUS.** Combatants may not kill, injure, or capture the enemy by false indication of an intent to surrender or by feigning shipwreck, sickness, wounds, or civilian status. A surprise attack by a person feigning shipwreck, sickness, or wounds undermines the protected status of those rendered incapable of combat. Similarly, since civilians are not lawful objects of attack, combatants may not disguise themselves in civilian clothing to engage in hostilities. Attacking enemy forces while posing as a civilian would put all civilians in jeopardy. Such acts of perfidy are punishable as war crimes.

1356 **ILLEGAL COMBATANTS.** Persons who take part in combat

operations without distinguishing themselves clearly from the civilian population are illegal combatants and are subject to punishment upon capture. Illegal combatants may be denied prisoner-of-war status and be tried and punished for falsely claiming noncombatant status during combat by a competent tribunal of the captor nation. Under U.S. policy, however, illegal combatants will be accorded prisoner-of-war status if they were carrying arms openly at the time of capture.

1357 SPIES

A. Spy Defined. A spy is someone who, while in territory under enemy control, seeks to obtain information while operating under a false claim of noncombatant or friendly forces status with the intention of passing that information to an opposing belligerent. Conversely, personnel conducting reconnaissance missions behind enemy lines while properly uniformed are not spies. Crew-members of warships and military aircraft engaged in intelligence collection missions in enemy waters or airspace are not spies unless the ship or aircraft displays false civilian, neutral, or enemy marking.

B. Legal Status. Spying during armed conflict is not a violation of international law. Captured spies are not, however, entitled to prisoner of war status. The captor nation may try and punish spies in accordance with its national law. Should a spy succeed in eluding capture and return to friendly territory, liability to punishment terminates. If subsequently captured during some other military operation, the former spy cannot be tried or punished for the earlier act of espionage. These rules apply only to members of the armed forces, including members of those resistance and guerrilla groups who qualify under the applicable international law as members of the armed forces who gather information under false pretenses. Espionage by civilians remains covered by the Hague Regulations, articles 29 and 30, as supplemented by the Fourth Convention and Additional Protocol I, as well as by the national law of espionage.

PRISONER OF WAR ISSUES

1358 POW REFERENCES

- A. Geneva Convention Relative to the Treatment of Prisoners of War of 1949 (GPW)
- B. DoD Directive 1300.7
- C. OPNAVINST 1000.24A.

1359 **PERSONS ENTITLED TO POW STATUS.** Persons entitled to POW status upon capture include members of the regular armed forces.

the militia and volunteer units fighting with the regular armed forces, and civilians accompanying the armed forces. Militia, volunteers, guerrillas, and other partisans not fighting in association with the regular armed forces qualify for POW status upon capture, provided they are commanded by a person responsible for their conduct, are uniformed or bear a fixed distinctive sign recognizable at a distance, carry their arms openly, and conduct their operations in accordance with the law of armed conflict.

A. Status Determinations. Should a question arise regarding a captive's entitlement to POW status, that individual should be accorded POW treatment until a competent tribunal convened by the captor determines the status to which that individual is properly entitled. Individuals captured as spies or as illegal combatants have the right to assert their entitlement to POW status before a judicial tribunal and to have the question adjudicated. Such persons have a right to be fairly tried for violations of the law of armed conflict and may not be summarily executed.

B. Evacuation to Safety. Article 19 requires that POWs be evacuated to areas away from the combat zone. POWs shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger and shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone. Only those POWs who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept back in a danger zone.

C. Temporary Detention Aboard Naval Vessels. International treaty law expressly prohibits "internment" of POWs other than in premises on land, but does not address temporary stay on board vessels. U.S. policy, however, permits detention of POWs, civilian internees (CI), and detained persons (DET) on naval vessels under certain circumstances. The detention must be temporary, i.e., limited to the minimum period necessary to evacuate such persons from the combat zone or to avoid significant harm such persons would face if detained on land. Use of immobilized vessels for temporary detention of prisoners of war, civilian internees, or detained persons must be authorized by NCA. Generally, persons may be temporarily detained as follows:

1. POW/CI/DET picked up at sea may be temporarily held on board as operational needs dictate, pending a reasonable opportunity to transfer them to a shore facility or to another vessel for evacuation to a shore facility.
2. POW/CI/DET may be temporarily held on board naval vessels while being transported between land facilities.
3. POW CI/DET may be temporarily held on board naval vessels if such detention would appreciably improve their safety or health prospects.

1360 **PUBLIC DISPLAY.** Article 13, GPW, prohibits the public display of POWs. Likewise, POWs must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Although videotape or photographs showing POWs being captured do not, by themselves, violate the Geneva Convention, photographs shown on worldwide television are counterproductive and may invite the enemy to charge us with using POWs for propaganda purposes or take reprisal actions against American POWs. The media's proximity to the modern battlefield dictates that commanders and public affairs officers try to minimize contact between the media and POWs in our control. These efforts must be taken with the proper discretion. We can stay out of camera range when possible but can not wrest cameras from photographers or confiscate film. If we desire to show our humane treatment of EPWs, we should not do it with photography. Similarly, commanders must make every effort to urge our allies to follow these guidelines.

1361 **CHAIN OF COMMAND.** For DoN POWs, the senior officer present in a POW situation will be the senior officer, line or staff, regardless of branch of service, who is not a chaplain or medical officer, unless all of the POWs are attached to the same command, in which case the officer detailed as the commanding officer, or his successor, will be the senior officer present. Article 1140.3, U.S. Navy Regulations, 1990. Chaplains and medical officers (medical, dental, nurse, and medical service corps) do not assume command as the senior officer present in a POW situation because it would be inconsistent with their protected status as retained (vice POW) personnel under Article 24 of the Geneva Convention.

1362 **HUMANE TREATMENT.** POWs must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a POW in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no POW may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

A. Living Arrangements. Article 22, GPW, requires that POWs be held with captive compatriots and be provided with healthy living arrangements located on land. POWs interned in unhealthy areas, or where the climate is injurious for them, shall be removed as soon as possible to a more favorable climate. The Detaining Power shall assemble POWs in camps according to their nationality, language and customs, provided that such prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent.

B. Labor. Enlisted POWs may be required to engage in labor having no military character or purpose. Noncommissioned officers may only be required to perform supervisory work. Officers may not be required to work.

1363 **INTERROGATION.** Article 17, GPW, established strict guidelines on the interrogation of POWs, limiting the amount of information that a POW must give to his captors. Every POW, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information. Violation of this requirement may subject the POW to restriction of the privileges accorded to his rank or status.

A. I.D. Card. Each Party to a conflict is required to furnish the persons under its jurisdiction who are liable to become POWs, with an identity card showing the holder's surname, first names, rank, army, regimental, personal or serial number or equivalent information, and date of birth. The identity card may, furthermore, bear the signature or the fingerprints, or both, of the owner, and may bear, as well, any other information the Party to the conflict may wish to add concerning persons belonging to its armed forces. As far as possible the card shall measure 6.5 x 10 cm. and shall be issued in duplicate. The identity card shall be shown by the prisoner of war upon demand, but may in no case be taken away from him.

B. Interrogation Techniques. No physical or mental torture, nor any other form of coercion, may be inflicted on POWs to secure from them information of any kind whatever. POWs who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind. POWs who, owing to their physical or mental condition, are unable to state their identity, shall be handed over to the medical service. The identity of such POWs shall be established by all possible means, subject to the provisions of the preceding paragraph.

1364 **DISCIPLINE.** Under Article 82, GPW, POWs are subject to the laws, regulations, and orders in force in the armed forces of the Detaining Power.

A. Penal and Disciplinary Offenses. Article 82, GPW, distinguishes penal from disciplinary offenses. If the law, regulation, or order is punishable only when committed by a POW, i.e., the same act would not be punishable if committed by a U.S. servicemember, only disciplinary punishment can be imposed for the offense. The Detaining Power is encouraged under the GPW to use disciplinary rather than judicial measures whenever possible.

B. Permissible Disciplinary Punishments. The following disciplinary punishments are applicable to POWs:

1. A fine which shall not exceed 50 percent of the advances of pay and working pay which the POW would otherwise receive under articles 60 and 62 of the GPW for a period not to exceed thirty days.

2. Discontinuance of privileges granted over and above the treatment provided for by the GPW.
3. Fatigue duties not exceeding two hours daily (shall not be applied to officers).
4. Confinement.

C. Other Limitations on Punishment. Disciplinary punishments cannot be inhuman, brutal, or dangerous to the health of POWs. Nor can collective punishment for individual acts, corporal punishment, imprisonment in premises without daylight and, generally, any form of torture or cruelty be imposed. The duration of any single punishment cannot exceed 30 days, even when the POW is answerable for several acts occurring at the same time, regardless of whether the acts are related. POWs may not be subjected to reprisal action.

D. Escape. Escaping POWs who are recaptured are subject only to disciplinary punishment, even for repeat escape offenses. POWs who commit offenses in the furtherance of an escape attempt which do not entail any violence against life or limb, such as offenses against public property, theft without intention of self-enrichment, using false papers, or wearing civilian clothes are subject to disciplinary punishment only.

E. Procedure. Disciplinary punishment may be ordered only by an officer having disciplinary powers as a camp commander and, before any punishment is awarded, POWs are entitled to an opportunity to explain their conduct and defend themselves. Further, records of disciplinary punishments must be kept by the camp commander and be produced for inspection by representatives of the Protecting Power, e.g., International Committee of the Red Cross. POWs cannot be transferred to penal institutions to serve disciplinary punishments. Further, all premises in which disciplinary punishments are served must conform to the sanitary requirements of Article 25 of the GPW. While undergoing disciplinary confinement, POWs are accorded the benefits of the GPW except in so far as these are inapplicable because of their confinement. Nevertheless, POWs in disciplinary confinement are permitted to send and receive letters, read and write, receive medical attention, exercise, and to stay in the open air for two hours daily.

1365 **CODE OF CONDUCT.** The Code of Conduct, reproduced below, outlines basic responsibilities and obligations of service members subjected to hostile detention. The Code of Conduct was first promulgated by President Eisenhower on August 17, 1955, as Executive Order 10631, "Code of Conduct for Members of the Armed Forces of the United States." The Code is consistent with the requirements of GPW. Under the GPW and the Code, when questioned, a POW is required to give name, rank, service number and date of birth. Under GPW, the enemy may not use coercion to force a POW to provide any additional information.

A. Peacetime Application. The Code of Conduct applies during peace and war. Personnel captured or detained by hostile governments or terrorists are often exploited for ransom, release of fellow captives, false confessions or information and propaganda efforts to discredit either the captives themselves or their government.

B. Training. DoD Directive 1300.7 promulgates training policy and procedures. Training shall be conducted without delay upon entry of members into the Navy and shall continue throughout their military careers, providing periodic and progressive training appropriate to risk of capture or exploitation. OPNAVINST 1000.24A; OPNAVINST C3305.1.

C. Violations. The Code of Conduct itself is not punitive. Violations may, however, constitute violations of the UCMJ, e.g.: Articles 90, 91, 99, 100, 104, and 105.

CODE OF CONDUCT

Article I

I am an American fighting in the forces which guard my country and our way of life. I am prepared to give my life in their defense.

Article II

I will never surrender of own free will. If in command, I will never surrender the members of my command while they still have the means to resist.

Article III

If I am captured I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy.

Article IV

If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way.

Article V

When questioned, should I become a prisoner of war, I am required to give name, rank, service number and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.

Article VI

I will never forget that I am an American, fighting for freedom, responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America.

ENFORCEMENT

1366 **ENFORCING THE LAW OF ARMED CONFLICT.** Various means are available to belligerents under international law for inducing the observance of legitimate warfare. In the event of a clearly established violation of the law of armed conflict, the aggrieved nation may:

- A. Publicize the facts with a view toward influencing world public opinion against the offending nation;
- B. Protest to the offending nation and demand that those responsible be punished and/or that compensation be paid;
- C. Seek the intervention of a neutral party, particularly with respect to the protection of prisoners of war and other of its nationals that have fallen under the control of the offending nation;
- D. Execute a reprisal action; and
- E. Punish individual offenders either during the conflict or upon cessation of hostilities.

1367 **THE PROTECTING POWER.** Under the Geneva Conventions of 1949, the treatment of prisoners of war, interned civilians, and the inhabitants of occupied territory is to be monitored by a neutral nation known as the Protecting Power. Due to the difficulty of finding a nation which the opposing belligerents will regard as truly neutral, international humanitarian organizations, such as the International Committee of the Red Cross, have been authorized by the parties to the conflict to perform at least some of the functions of a Protecting Power.

1368 **THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC).** The ICRC is a nongovernmental, humanitarian organization based in Geneva, Switzerland. The ruling body of the ICRC is composed entirely of Swiss citizens and is staffed mainly by Swiss nationals. (The ICRC is distinct from and should not be confused with the various national Red Cross societies such as the American National Red Cross.) Its principal purpose is to provide protection and assistance to the victims of armed conflict. The Geneva Conventions recognize the special status of the ICRC and have assigned specific tasks for it to perform, including visiting and interviewing prisoners of war, providing relief to the civilian population of occupied territories, searching for information concerning missing persons, and offering its "good offices" to facilitate the establishment of hospital and safety zones. Under its governing statute, the ICRC is dedicated to work for the faithful application of the Geneva Conventions, to endeavor to ensure the protection

of military and civilian victims of armed conflict, and to serve as a neutral intermediary between belligerents.

1369 **REPRISAL.** A reprisal is an enforcement measure under the law of armed conflict consisting of an act which would otherwise be unlawful but which is justified as a response to the unlawful acts of an enemy. The sole purpose of a reprisal is to induce the enemy to cease its illegal activity and to comply with the law of armed conflict. Reprisal may be taken against enemy armed forces; enemy civilians, other than those in occupied territory; and enemy property. Although reprisals are lawful when the requirements for their use are met, there is always the risk that it will trigger retaliatory escalation (counter-reprisals) by the enemy. Consequently, the United States has historically been reluctant to resort to reprisal actions.

A. Requirements. To be valid, a reprisal action must:

1. Be ordered by the highest authority of the belligerent's government [Only NCA can authorize reprisals by U.S. forces];
2. respond to illegal acts of warfare committed by an adversary government, its military commanders, or combatants for which the adversary is responsible, i.e., anticipatory reprisal is not authorized;
3. be preceded by a demand for redress by the enemy of his unlawful acts, when circumstances permit;
4. be taken to cause the enemy to cease its unlawful activity, i.e., reprisal action should be brought to the attention of the enemy to achieve maximum effectiveness and must never be taken for revenge;
5. be used only as a last resort when other enforcement measures have failed or would be of no avail;
6. be proportional to the original violation; and
7. cease as soon as the enemy is induced to desist from its unlawful activities and to comply with the law of armed conflict.

B. Immunity. Reprisals may never be taken against:

1. Prisoners of war or interned civilians;
2. Wounded, sick, and shipwrecked persons;

3. Civilians in occupied territory;
4. Hospitals and medical facilities, personnel and equipment, including hospital ships, medical aircraft, and medical vehicles.

1370 **RECIPROCITY.** Some obligations under the law of armed conflict are reciprocal in that they are binding on the parties only so long as both sides continue to comply with them. A major violation by one side will release the other side from all further duty to abide by that obligation. The concept of reciprocity is not applicable to humanitarian rules of law that protect the victims of armed conflict, that is, those persons protected by the 1949 Geneva Conventions. The decision to consider the United States released from a particular obligation following a major violation by the enemy will ordinarily be made by the NCA.

WAR CRIMES

1371 **WAR CRIMES UNDER INTERNATIONAL LAW.** War crimes may be defined as those acts which violate the law of armed conflict. Acts constituting war crimes may be committed by members of the armed forces or civilians. Belligerents have the obligation under international law to punish their own nationals who commit war crimes. Belligerents also have the right to punish enemy armed forces personnel and enemy civilians, who fall under their control, for such offenses. War crimes are classified by their severity as "ordinary war crimes," e.g., compelling a prisoner of war to perform prohibited labor, and "grave breaches," e.g., torture.

1372 **TRIALS.** Although permitted under international law, nations rarely try enemy combatants during hostilities. Trials might provoke undesirable actions from an enemy and complicate humanitarian protections applicable to one's own nationals. Even after the close of hostilities criminal trials against lawful enemy combatants have been the exception, not the rule. No international trials were held against World War I combatants. Some trials were held by German authorities of German personnel as required by the Allies. Due to the gross excesses of the Axis Powers during World War II, the United Nations determined it necessary to assign individual criminal responsibility to the principal political, military, and industrial leaders responsible for the initiation of the war and various inhumane policies. Since World War II, state practice has generally avoided such prosecutions after conflicts have terminated.

1373 **JURISDICTION OVER OFFENSES.** Except for war crimes trials conducted by the Allies after World War II, the majority of prosecutions for violations of the law of armed conflict have been trials of one's own forces for breaches of

military discipline. Although jurisdiction extends to enemy personnel, trials have almost exclusively been against unlawful combatants, such as persons who take part in combat operations without distinguishing themselves clearly from the civilian population during battle or those acting without state sanction for private ends. In the United States, jurisdiction is not limited to offenses against U.S. nationals, but extends to offenses against persons of other nationalities. Violations by enemy personnel may be tried as offenses against international law, which forms part of the law of the United States. In occupied territories, trials are usually held under occupation law. Trials of such personnel have been held in military courts, military commissions, provost courts, military government courts, and other military tribunals. War crimes are not subject to any statute of limitations.

1374 **FAIR TRIAL STANDARDS.** International law standards for the trial of war crimes are found in the 1949 Geneva Convention for the Protection of Prisoners of War (articles 82-108), in the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (articles 64-75 and 117-26), and in article 6 of the 1977 Additional Protocol II. Failure to provide a fair trial for the alleged commission of war crimes is itself a war crime, a grave breach under common article 50/51/130/147 of the 1949 Geneva Conventions.

1375 **DEFENSES**

A. Ignorance of the Act of a Subordinate. Commanders are responsible for ensuring that they conduct all combat operations in accordance with the law of armed conflict. They are also responsible for the proper performance of their subordinates. While commanders may delegate some or all of their authority, they cannot delegate responsibility for the conduct of the forces they command. The fact that a commander did not order, authorize, or knowingly acquiesce in a violation of the law of armed conflict by a subordinate is not a defense if the commander failed to exercise command authority properly or otherwise failed to take reasonable measures to discover and correct violations that may already have occurred.

B. Superior Orders. All members of the naval service have a duty to comply with the law of armed conflict and, to the utmost of their ability and authority, to prevent violations by others. Members of the naval service must obey all lawful orders issued by a superior. Under both international law and U.S. law, an order to commit an obviously criminal act, such as the wanton killing of a noncombatant or the torture of a prisoner, is an unlawful order. Compliance with a patently unlawful order of a military or civilian superior is not a defense. The standard is whether under the same or similar circumstances a person of ordinary sense and understanding would know the order to be unlawful. If the person knows the act is unlawful and only does it under duress, this circumstance may be taken into consideration either by way of defense or in mitigation of punishment.

C. Military Necessity. When discussing military necessity as a

defense to alleged war crimes, U.S. military tribunals have applied the same rule to both individuals and nations. While sanctioning measures necessary to compel the submission of the enemy or to protect the safety of forces in occupied territory, international law does not allow the individual combatant or his superiors to destroy life and property not required by the necessities of war. This law recognizes that a certain number of noncombatants may become inadvertent victims of armed conflict and provides that this unavoidable destruction is permissible when not disproportionate to the military advantage to be gained.

D. Acts Legal or Obligatory Under National Law. The fact that national law does not prohibit an act which constitutes a war crime under international law does not relieve the person who committed the act from responsibility under international law. These circumstances may be considered in mitigation of punishment.

1376 **SANCTIONS.** Under international law, any punishment, including the death penalty, may be imposed on any person found guilty of a war crime. United States policy requires that the punishment be deterrent in nature and proportionate to the gravity of the offense.

CHAPTER 14

SECURITY ASSISTANCE

1401 **INTRODUCTION.** Security assistance enhances U.S. national security by providing defense articles, services, training, and other assistance by grant, credit, or cash sales to friendly foreign nations. Authority for these programs is found in the Foreign Assistance Act and the Arms Export Control Act. Basic guidance is found in the Security Assistance Management Manual, DoD 5105.38-M of 1 October 1988. The multi-service security assistance training instruction, SECNAVINST 4950.4, Joint Security Assistance Training (JSAT) Regulation, became effective 27 Mar 90 (superseding MCO 4950.2) and updates much of the material on international student administration and exchange training. Security assistance has been part of our nation's history ever since the Revolutionary War. Since World War II, security assistance has become an institutionalized and continuing program used to advance U.S. interests in a global environment. If the past is prologue, security assistance is not just a short-range program; rather, it will be in existence for many years to come as an important tool of U.S. foreign policy. This chapter examines security assistance terminology, what security assistance entails, and the broad aspects of ongoing U.S. security assistance programs.

1402 **SECURITY ASSISTANCE DEFINED.** The term "security assistance" itself is subject to differing interpretations. Security assistance is often referred to as an "umbrella" term, an elastic notion with dimly defined boundaries. To further confuse matters, the term security assistance is occasionally used in a parallel context with other equally elusive terms such as foreign aid, foreign assistance, military assistance, arms transfers, international defense cooperation, and international logistics.

A. The DoD Perspective. Security assistance is defined in at least two primary DoD documents.

1. The Department of Defense Dictionary of Military and Associated Terms, JCS Pub. 1, defines security assistance as:

Group of programs authorized by the Foreign Assistance Act of 1961, as amended, and the Arms Export Control Act of 1976, as amended, or other related statutes by which the United States provides defense articles, military training, and other defense related services, by grant, credit or cash sales, in furtherance of national policies and objectives.

2. The Glossary of Selected Terms in the Security Assistance Management Manual (SAMM) published by the Defense Security Assistance Agency,

defines security assistance in a highly similar manner.

B. Other Statutory Definitions. Security assistance is broadly defined in the Foreign Assistance Act of 1961, as amended (FAA) and discussed in the Arms Export Control Act, as amended (AECA). The broad definition in Section 502B of the FAA, entitled "Human Rights," may reflect the congressional intent to provide statutory leverage over a broad range of activities so that the government may effectively carry out its human rights policies. In the other contexts, where the intent of oversight is different, security assistance is more restrictively defined.

C. Other Related Terminology

1. International Logistics. Within DoD, the term "international logistics" is used in an almost synonymous sense to describe certain security assistance management activities. While a high degree of commonality between the two concepts may exist, there are some unique differences. For example, the Economic Support Fund, Peacekeeping Operations and professional military education program aspects of security assistance generally do not equate to international logistics. Conversely, some facets of the NATO rationalization, standardization, and interoperability (RSI) cooperative efforts involve certain international logistics interests but are not usually categorized as security assistance.

2. International Programs. This term, which appears to be coming into popular usage, is broadly defined in U.S. Army Chief of Staff Regulation 5-2 as encompassing "those programs, actions, and initiatives, both foreign and US originated, involving Security Assistance Programs (Foreign Military Sales, Military Assistance Program/Grant Aid, foreign military training FMS and IMET) [etc.]."

3. International Logistics Support. As defined in JCS Pub. 1, the term international logistics support is: "The provision of military logistic support by one participating nation to one or more participating nations, either with or without reimbursement."

4. Collective Security. This term has been used regularly in the annual JCS document entitled United States Military Posture. Generally, security assistance is said to be supplied "in furtherance of the principle of" collective security.

5. International Defense Cooperation. This phrase, which is found in Section 1 of the AECA, may also appear to border on being a synonym for, or a more broader term which encompasses, security assistance.

6. Military Assistance. As a generic term, military assistance is essentially used to describe those security assistance programs administered by the Department of Defense: Foreign Military Sales, Foreign Military Financing Program, the International Military Education and Training (IMET) Program, and the Military

Assistance Program (MAP).

7. Military Export Sales. This term represents another subset of security assistance. According to the SAMM, military export sales are: "All sales of defense articles and defense services made from U.S. sources to foreign governments, foreign private firms and international organizations, whether made by DoD or by U.S. industry directly to a foreign buyer."

8. Grant Aid. This term appears today in numerous Congressional reports and DoD documents. The SAMM defines grant aid as: "Military Assistance rendered under the authority of the FAA for which the United States receives no dollar reimbursement."

9. Arms Transfers. This term, which tends to relate to the "weapons or armaments" aspects of security assistance, can also have a variety of meanings. The U.S. Arms Control and Disarmament Agency (ACDA), in its annual publication *World Military Expenditures and Arms Transfers*, defines arms transfers as "the international transfer (under terms of grant, credit, barter or cash) of military equipment, usually referred to as conventional, including weapons or war, parts thereof, ammunition, support equipment, and other commodities designed for military use."

1403 **STATUTORY REQUIREMENTS.** Statutory requirements regarding security assistance include:

- A. Transfers of defense articles or services must be to an eligible country.
- B. Defense articles or services must be properly used by the purchaser.
- C. Withdrawal from U.S. stocks requires proper authorization.
- D. A purchasing country must pay full value, including applicable costs and surcharges.
- E. The purchaser must agree not to transfer defense articles received from the United States to any third country without U.S. permission.

1404 **SECURITY ASSISTANCE PROGRAM COMPONENTS.**

According to the Congressional Presentation Document (CPD) for Security Assistance Programs, there are five major security assistance program components which require U.S. funding. This section will examine those programs, as well as the Foreign Military Sales (FMS) and Construction Sales Program, and Commercial Sales licensed under the AECA.

- A. The Foreign Military Financing Program (FMFP). FMFP consists of

congressionally appropriated grants and loans which enable eligible foreign governments to purchase U.S. defense articles, services, and training through either FMS or direct commercial sales channels. The FMFP is authorized under the provisions of Sections 23, 24, and 31 of the AECA, and originally served to provide an effective means for easing the transition of foreign governments from grant aid (i.e., MAP and IMET) to cash purchases. In recent years, however, the grant element of the FMFP has grown substantially.

1. Background. In the early 1980s, as market rates rose to 12 percent and higher, countries accepting FMS guaranty loans through the Federal Financing Bank (FFB) found themselves faced with an increasing financial burden, and this was often exacerbated by high interest rates on other types of loans which these countries received. As the indebtedness levels of these countries escalated, various efforts to resolve their EMS financial problems were attempted.

2. Restructuring. The FY 1989 Appropriations Act (Pub. L. 100-461, 1 October 1988) made certain key changes in the terminology and structure of this program. The "forgiven loan credit" component of the program as now been identified as "FMFP grants," distinguishing them from repayable "FMFP loans." Congress appropriated a total of \$4.2 billion for the FY 1989 FMFP. The President has sought a 100% grant funded FMS financing program with funding increased to \$5 billion. While appropriations have increased each year, Congress has chosen to maintain funding for a concessional loan program as well, i.e., loans below the market rate but no lower than 5% per annum. Nine countries received FMFP funding in FY 1989, seven solely in the form of grants.

3. Debt Reform. The "FMS Debt Reform Program," introduced in FY 1988, involves a dual approach of loan refinancing and interest rate reductions to help countries with their debt problems.

a. Loan Refinancing. The loan refinancing approach is limited to the period FY 1988-FY 1991 and permits countries to prepay at par, or face value, the principal amounts (and arrearages) of their FMS guaranty and direct loans which mature after 30 September 1989 and which bear annual interest rates of 10 percent or higher.

b. Interest Rate Reductions. This rate reduction plan is available to countries having guaranty loans that carry interest rates in excess of 10 percent as an alternative to the refinancing approach. Under this approach, the annual interest rates of all such guaranty loans may be reduced to 10 percent for the remaining life of the loans. This approach does not apply to direct loans; only guaranty loans which have annual interest rates exceeding 10 percent.

c. The Stick. Countries taking advantage of these debt reform opportunities must bring their payments on U.S. guaranteed and any other

AECA related loans to within a 90-day repayment limit. If not, U.S. funded military assistance programs to that country will be suspended. Countries which adopt the refinancing option must comply immediately; countries which adopt the "interest rate reduction" plan will have two years from the time the reduction is effective to bring their loan payments current, i.e., within 90 days.

B. The Military Assistance Program (MAP). Prior to FY 1982, appropriated MAP funds were used to transfer U.S. defense articles and services directly to recipient countries. However, the growth in FMS during the late 1970s led to the phasing-out of most MAP grants in the early 1980s. An amendment to Section 503(a)(3) of the FAA in the International Security and Development Cooperation Act of 1980 (Pub. L. 94-533) paved the way for a major change in the application of MAP

1. MAP Merger. The Amendment permits the transfer of a country's grant MAP funds into the FMS Trust Fund where they are merged with that country's cash deposits and/or any available FMS financing monies to fund the country's FMS cases. Actual implementation of this so-called "MAP Merger Program" began in FY 1982 with an appropriation of \$176.5 million for 14 countries. By FY 1987, MAP funding had grown to \$950 million for 38 countries and regional programs.

2. Future Funding. Following a 26% cut in MAP funding in FY 1988, the President reduced the request for MAP funding to \$467 million, hand in hand with the Administration's request for an all-grant FMS financing program discussed above. Although Congress rejected the all-grant EMS financing program, it held MAP funding the \$467 million requested. The Administration was compelled to cut back its plans to furnish MAP funding for 30 country and regional programs, and only 24 such programs will be funded in FY 1990. As the FMFP and MAP funding allocation process evolves, the congressional response remains to be seen.

C. The International Military Education and Training (IMET) Program. IMET provides training on a grant basis in the United States and in some overseas U.S. military facilities to selected foreign military and related civilian personnel. In earlier years, grant aid training of foreign military personnel was funded as part of the MAP appropriation. Starting with FY 1976, a separate authorization for IMET was established in the FAA.

1. Background. Since 1950, IMET and its predecessor program have trained in excess of 500,000 officers and enlisted personnel--representing most countries of the free world. More than 2,000 have been trained in different specialties--from basic technical skills to professional military education. The training advances the efficiency, professional performance, and readiness of each nation's armed forces to support specific professional military requirements. In addition, English language training, which is essential to CONUS training, contributes directly to increased rapport with the United States and, in the long

term, to a greater understanding of U.S. society, institutions, and ideals, and commitment to internationally recognized human rights. In addition to teaching military skills and U.S. military doctrine, IMET provides significant opportunities for future access to the civilian and military leadership of other countries. A significant segment of present and future military leaders are likely to hold future positions of prominence in their countries. In FY 91, Congress earmarked \$1 million in IMET funds in what has become known as the Expanded IMET Initiative to expend professional-level training with a focus on creating and implementing effective military justice systems and codes of conduct, with special emphasis on the protection of human rights and civilian control of the military.

2. Funding Levels. In 1980, Section 644(m) of the FAA was amended to authorize IMET tuition costing in terms of "the additional costs that are incurred by the United States Government in furnishing such assistance." Section 21 (a)(3) of the AECA was also amended to allow IMET recipients to purchase FMS training on an "additional cost" basis. The practical effects of these changes were to substantially reduce tuition costs for IMET-funded students, and thereby increase the amount of training an eligible country can obtain with its IMET grant funds and through FMS purchases. Funding for IMET in recent years has not exceeded the high water mark of \$56 million in FY 1987. Congress has also been concerned that some countries receiving IMET funds are able to pay their own way. In the FY 1989 Appropriations Act (P.L. 100-461), Congress established a prohibition on the use of IMET funds by any country whose annual per capita gross national product (GNP) exceeds \$2,349.00 unless that country agrees to fund from its own resources the transportation costs and living allowances (TLA) of its students. IMET funds would thus be restricted to tuition costs. The Department of State reported that 20 of the 109 countries funded fell into this new "high income" category; of those 20, 11 had used IMET funds in FY 1988 to pay for student TLA. This new requirement is expected to present these countries with internal budget issues regarding their ability to fund their students' TLA.

D. The Economic Support Fund (ESF). ESF is authorized by Chapter 4 of Part II of the Foreign Assistance Act and was established to promote economic and political stability in areas where the United States has special political and security interests and has determined that economic assistance can be useful in helping to secure peace or to avert major economic or political crises. ESF is a flexible economic instrument which is made available on a loan or grant basis for a variety of economic purposes, including balance of payment support, infrastructure, and other capital and technical assistance development projects. While a substantial amount goes for balance of payments type aid, the ESF also provides for programs aimed at primary needs in health, education, agriculture, and family planning. Congress has made it clear that funds from this account should be used to the maximum extent possible for development and to support equitable growth that meets the basic needs of the poor. The ESF is administered by the Agency for International Development (AID) under the overall policy direction of the Secretary of State. ESF funding for FY 1989

totaled \$3.2 billion.

E. Peacekeeping Operations (PKO). PKO is authorized by Chapter 6 of Part II of the Foreign Assistance Act and was established to provide for that portion of Security Assistance devoted to programs such as the Multinational Force and Observers (MFO) which implement the 1979 Egyptian-Israeli peace treaty, and the U.S. contribution to the United Nations Force in Cyprus (UNFICYP). Annual funding for PKO for FY 1987-89 was set at \$31.7 million.

F. Foreign Military Sales (FMS) and Foreign Military Construction Sales Program.

1. FMS is a non-appropriated program through which eligible foreign governments purchase defense articles, services, and training from the United States Government. The purchasing government pays all costs that may be associated with a sale. In essence, there is a signed agreement (normally documented on a DD Form 1513--Letter of Offer and Acceptance) between the U.S. Government and a foreign government. Each DD Form 1513 is commonly referred to as a "case" and is assigned a case identifier for accounting purposes. Under FMS, military items and services, including training, may be provided from DoD stocks (Section 21, AECA) or from new procurement (Section 22, AECA). If the source of supply is new procurement, on the basis of having a DD Form 1513 which has been accepted by the foreign government, the U.S. Government agency or military department assigned cognizance for this "case" is authorized to enter into a subsequent contractual arrangement with industry to provide the item or service initially requested.

2. Foreign Military Construction Sales (FMCS), as authorized by Section 29 of the AECA, involve the sales of design and construction services to eligible purchasers. The construction sales agreement and sales procedures generally parallel those of FMS. In FY 90, FMS and FMCS accounted for an estimated \$8 billion in sales to 80 countries.

G. Commercial Sales Licensed under the AECA. Section 502B of the FAA includes commercial sales as an element of security assistance for congressional oversight purposes. A commercial sale licensed under the AECA is a sale made by U.S. industry directly to a foreign buyer. Unlike the procedures employed for FMS, the commercial sales transactions are not administered by DoD and do not involve a government-to-government agreement. Rather, the U.S. Governmental "control" procedure is accomplished through licensing by the Office of Munitions Control, Department of State. Commercially licensed sales are authorized under Section 38 of the AECA. The day-to-day rules and procedures for these types of sales are contained in the International Traffic in Arms Regulations (ITAR). Commercial sales exports for FY 1989 were estimated at about \$7 billion.

1405

OTHER RELATED PROGRAMS.

In addition to the above

seven major programs, there are some other related programs worthy of discussion.

A. Excess Defense Articles (EDA) Program. EDA is administered by DoD and involves defense articles no longer needed by the U.S. Armed Forces. Such items are either sold under the FMS program or transferred as grant assistance under the provisions of Section 515, FAA, generally referred to as the Southern Region Amendment. Under section 644(g) of the FAA, "excess defense articles" means the quantity of U.S. defense articles owned by the United States Government, and not procured in anticipation of military assistance or sales requirements, or pursuant to a military assistance or sales order, which is in excess of the Approved Force Acquisition Objective and Approved Force Retention Stock of all DoD components at the time of transfer. Section 31(d) of the AECA limits the annual acquisition value of EDA that may be provided foreign governments by sale or grant to \$250 million.

B. Stockpiling of Defense Articles for Foreign Countries. Section 514(b) of the FAA sets an annual ceiling on the value of additions to stockpiles of defense articles located abroad that may be set aside, earmarked, reserved, or otherwise intended for use as war reserve stocks for allied or other foreign countries (other than those for NATO purposes). For FY 1988, Congress approved an Administration request for an annual ceiling on the value of additions to the stockpiles of \$116 million, of which \$106 million would apply against the Korean war reserve stockpile and \$10 million would be used to establish a new stockpile in Thailand. [Pub. L. 100-202.] For FY 1989, Congress approved additions to the stockpiles of \$77 million, with \$67 million for Korea and \$10 million for Thailand. These are the only two countries outside of NATO where such war reserve stockpiles have been authorized. The defense articles in these stockpiles remain U.S. military service-owned stocks as war reserves. Any future transfer of title control of any of these stocks would require full reimbursement by the purchaser under FMS procedures or from military assistance funds available for that purpose under security assistance legislation prevailing at the time the transfer would be made.

C. Special Defense Acquisition Fund (SDAF). The SDAF was authorized by the International Security and Development Cooperation Act of 1981, which added a new Chapter 5 to the AECA. The SDAF is to be used as a revolving fund under DoD control to finance the acquisition of defense articles and services in anticipation of their transfer (pursuant to the AECA, the FAA, or other legislation) to eligible foreign nations and international organizations. DoD can capitalize the SDAF with non-recurring research, development, and production cost recoupments for U.S. military equipment; and asset use and facility rental charges for the use of DOD facilities and equipment. Under 10 U.S.C. § 114(c), the size of the SDAF ("capitalization level") currently cannot exceed \$1.070 billion cumulatively. Once capitalized, the SDAF account will be reimbursed through sales and transfers of items carried in the account. Congress annually provides an "obligational authority" for the SDAF which establishes a ceiling on the specific amounts in the fund that are

available for obligation/expenditure during a given fiscal year. SDAF obligational authority for FY 1989 was \$236.365 million.

1406 **REQUESTS FOR SECURITY ASSISTANCE.** There is often a fine line between routine goodwill and regulated security assistance. For example, a system demonstration for foreign personnel may constitute training, depending on the detail involved. Devoting U.S. manpower or equipment to a local government project in a foreign country clearly provides a foreign relations benefit, but it may also constitute security assistance. The same applies to disposal of excess or damaged material to foreign authorities. In each case, approval from higher authority may or may not be required. Commanders should refer foreign requests for training, purchase, lease or donation of equipment to the Security Assistance Officer (SAO) of the local U.S. diplomatic mission and up the chain of command.

CHAPTER 15

HUMANITARIAN AND CIVIC ASSISTANCE

1501 **INTRODUCTION.** This chapter provides an overview of Humanitarian and Civic Assistance (HCA) activities and the Developing Country Combined Exercise Program (DCCEP), together with funding and purpose guidelines.

1502 **HUMANITARIAN AND CIVIC ASSISTANCE (HCA).**
Title 10 funds may be used to defer the costs associated with three distinct forms of HCA: Statutory, De Minimis, and Stevens.

A. Statutory HCA. 10 U.S.C. § 401(c)(1) HCA. This form of HCA is to be carried out in conjunction with authorized military operations, such as JCS directed/coordinated exercises and Single Service deployments for training (DPTs) and is funded from specifically appropriated Program 10 - Host Nation Support O&M funds. This form of HCA must:

1. Enhance the security interests of both the United States and the recipient country;
2. Enhance the specific operational readiness skills of participating members of the Armed Forces;
3. Complement, not duplicate, any other form of social or economic assistance which may be provided to the country concerned by any other department or agency of the U.S. Government, and serve the basic economic and social needs of the people of the country concerned;
4. Not be provided, directly or indirectly, to any individual, group, or organization engaged in military or paramilitary activity;
5. Not be provided to any foreign country unless the Secretary of State (or his designated representative) specifically approves the provision of such assistance.
6. Be restricted to medical, dental, and veterinary care provided in rural areas of a country; construction of rudimentary surface transportation systems; well-drilling and construction of basic sanitation facilities; and rudimentary construction and repair of public facilities.

B. De Minimus HCA. 10 U.S.C. § 401(c)(2) HCA. This form of HCA is also carried out in conjunction with authorized military operations, but consists of de minimus HCA activities for which only minimal expenditures may be incurred. De Minimus HCA is not funded from specifically appropriated Program 10 (Host Nation Support) O&M funds under 10 U.S.C. § 401(c)(1), but rather from Program 2 (General Purpose) O&M funds. De Minimus HCA is not subject to the requirements set forth above in conjunction with 10 U.S.C. § 401(c)(1) Statutory HCA. Congress has set forth the following activities as examples of de minimus HCA:

1. A unit doctor's examination of villages for a few hours, with the administration of several shots and the issuance of some medicine, but not the deployment of a medical team for the purpose of providing mass inoculations to the local populace.

2. The opening of an access road through trees and underbrush for several hundred yards, but not the asphaltting of a roadway.

C. Stevens HCA. This HCA is undertaken "incidental" to authorized military operations (JCS directed/coordinated exercises only). Stevens HCA is funded by Program 2 (General Purpose) O&M funds; recurring HCA authority appears in the annual DoD Appropriations Act. Stevens HCA must:

1. Be conducted incidental to only JCS directed or coordinated exercises;
2. Enhance the security interests of both the United States and the recipient country;
3. Enhance the specific operational readiness skills of participating members of the Armed Forces;
4. Complement, not duplicate, any other form of social or economic assistance which may be provided to the country concerned by any other, department or agency of the U.S. and serve the basic economic and social needs of the people of the country concerned;
5. Not be provided to any individual, group, or organization engaged in military or paramilitary activity;
6. Be "incidental" in nature. Although there exists no statutory or regulatory definition of "incidental" HCA, such HCA must consist only of activities deemed to be "minor" when viewed in the context of the overall exercise scenario in which they are to occur. A "reasonableness" standard must be used to make a determination concerning the "minor" nature of such HCA

activities, and this standard must be applied in a manner reflective of the expressed congressional intent that this particular form of HCA authority be limited. Stevens (incidental) HCA activities cannot be designed in such a way as to constitute major exercise activities in their own right. Such HCA must be provided as only an incidental benefit to a comprehensive training program - not as a stand-alone civic action program. Accordingly, a determination must be made as to what amount of incremental O&M exercise cost associated with HCA would be reasonable in view of the overall amount of O&M funds to be expended for a particular exercise. Notwithstanding the limited nature of Stevens HCA, the scope and quantity of this form of HCA may exceed that provided under the de minimus HCA standard discussed above.

1503 DEVELOPING COUNTRIES COMBINED EXERCISE PROGRAM (DCCEP).

Under 10 U.S.C. § 2010, Program 10 (Host Nation Support) O&M funds may be used to pay the incremental expenses incurred by a developing country as the direct result of its participation in a bilateral or multilateral combined military exercise. The term "combined military exercise" refers to both joint and Single Service combined exercises conducted in conjunction with host nation military units. Funds may be expended, provided:

- A. The exercise is undertaken primarily to enhance U.S. security interests;
- B. The participation by the country concerned is necessary to the achievement of the fundamental objectives of the exercise and these objectives cannot be achieved unless the United States provides the incremental expenses incurred by the country;
- C. The country supported is considered a "developing country"; and
- D. The exercise does not replace (but can, and should complement) initiatives being funded by another U.S. Government agency or foreign government.

1504 FUNDING GUIDANCE. Funds used for HCA and DCCEP activities must be expended per the following guidelines.

A. HCA Activities

1. HCA Engineer Projects. HCA engineer projects include well-drilling and the construction of basic sanitation facilities, rudimentary construction and repair of public facilities, and the construction of rudimentary surface transportation systems. "Rudimentary construction" refers to wood frame or concrete block construction, interior and exterior electrical, rudimentary water supply and

sewer systems, and basic carpentry. Funds for these projects may be used to purchase and transport supplies, materiel, and fuel, as well as for equipment leases. These funds will not be used to finance the rehabilitation of host country equipment for the purpose of using such equipment in an exercise, or to purchase spare parts for host country use during the exercise.

2. HCA Medical Projects. HCA medical projects include medical, dental, and veterinary care provided in rural areas of a recipient country. Funds for HCA medical projects may be used for medical, dental or veterinary supplies.

B. DCCEP Funding

1. Proper Uses. DCCEP funds may be used to pay for the incremental exercise costs of a developing country, to include:

a. The reasonable and proper cost of rations, fuel, training munitions, and transportation required during an exercise. Generally, only common items will be provided (e.g., training munition for weapon systems used by U.S. Forces, stocked in Panama); ammunition will not normally be procured for other weapon systems.

b. The cost of unit movements and transportation of DCCEP material. Opportunity airlift on military aircraft will not be reimbursable; however, any DoD aircraft dedicated to the support of a developing country will be billed at the MAC DoD user rate.

2. Improper Uses. DCCEP funds may not be used for the following reasons:

- a. Engineer repair/construction projects.
- b. The developing country's labor costs.
- c. Common Table of Allowances (CTA) or Table of Equipment (TOE) equipment (current guidance does not allow U.S. Forces to purchase these items with exercise funds).
- d. Military pay and allowances of the developing country's armed forces.
- e. Utility expenses for the country's camps.
- f. Claims against the country's armed forces for damages incurred during the exercise.

- g. Host nation costs incurred in providing support for activities other than combined exercises (e.g., security support provided by the host nation to a "U.S. only" deployment for training; recipients must be participants in a combined exercise.
- h. Supplies and equipment for use by the developing country's armed forces for HCA purposes.
- i. The purchase of spare or repair parts.
- j. The purchase of supplies or ammunition for the purpose of stockpiling by the recipient.

3. Contracting. All goods and services procured for a developing country under this authority must be contracted for by U.S. Government Contracting Officers, or, when a Contracting Officer is unavailable, by Ordering Officers appointed by the appropriate U.S. Forces Contracting Officer. The limit for orders placed by an Ordering Officer is \$2,500.00.

C. Funding Guidance Applicable to Both HCA and DCCEP.

- 1. Expenditure of HCA and/or DCCEP funds or the incurrence of reimbursable charges against these funds must be approved in advance.
- 2. No accessorial charges will be applied to goods or services provided under either HCA or DCCEP.

1505

REPORTING REQUIREMENTS

A. HCA Reporting Requirements. Both Statutory HCA and Stevens HCA must be reported annually to Congress, via SECDEF. Each report will identify HCA activities for the preceding fiscal year, including:

- 1. A list of the countries in which HCA activities were carried out;
- 2. the type and description of HCA activities carried out in each country; and
- 3. the amount expended in carrying out each HCA activity in each country.

B. DCCEP Reporting Requirements. An annual report will be submitted to Congress, via SECDEF, concerning the use of DCCEP funds, stipulating:

1. A list of the developing countries for which expenses have been paid by the United States during the preceding year; and
2. The amount of money expended on behalf of each government.

CHAPTER 21

RULES OF ENGAGEMENT

2101 INTRODUCTION. U.S. rules of engagement (ROE) are the means by which the National Command Authorities (NCA), i.e., the President and SECDEF or their duly deputized alternates or successors, authorize subordinate commanders to employ military force. ROE delineate the circumstances and limitations under which U.S. naval, ground, and air forces will initiate and/or continue combat engagement with enemy forces. At the national level, wartime ROE are promulgated by the NCA, through the JCS, to unified and specified commanders to guide them in the employment of their forces toward the achievement of broad national objectives. At the tactical level, wartime ROE are task-oriented and frequently mission-oriented. At all levels, U.S. wartime ROE are influenced by, and are consistent with, the law of armed conflict. The law of armed conflict provides the general framework within which U.S. ROE during hostilities are formulated. Because ROE also reflect operational, political, and diplomatic factors, they often restrict combat operations far more than do the requirements of international law. Wartime ROE frequently include restrictions on weapons and targets, and provide guidelines to ensure the greatest possible protection for noncombatants consistent with military necessity. This chapter provides an overview of ROE, recognizing that the classified character of wartime ROE hinders full discussion.

2102 PEACETIME AND WARTIME ROE DISTINGUISHED. The JCS Peacetime RoE provide the authority for and limitations on actions taken in self-defense during peacetime and periods short of prolonged armed conflict, for the defense of U.S. forces, the self-defense of the nation and its citizens, and the protection of U.S. national assets worldwide. Wartime ROE, on the other hand, reaffirm the right and responsibility of the operational commander generally to seek out, engage, and destroy enemy forces consistent with national objectives, strategy, and the law of armed conflict. Even during periods of armed conflict, 3JAs must be intimately familiar with both peacetime and wartime ROE to be able to advise their commanders. The peacetime ROE are not "turned off" when war begins; they will still guide our actions with respect to nations with whom we are not at war.

2103 PURPOSES OF ROE. ROE are one of the most effective tools for implementing strategic decisions made at higher levels, and provide a mechanism for controlling the shift from peace to war. They can be viewed as having three, more specific, purposes.

A. Political Purposes. ROE represent a measure of assurance that national policy will be followed in wartime or in sudden emergencies which do not allow time for communications between Washington and the field. The rules should be flexible

enough to accommodate changing circumstances. They should be designed to allow military courses of action that advance political intentions with a minimum chance for undesired escalation or reaction. For this reason and others, NCA reserves the authority to employ certain weapons.

B. Military Purposes. ROE place limitations on the freedom of the on-scene commander to deploy his forces to accomplish the mission. They do not, however, interfere with his right and responsibility to protect his command against attack or an imminent threat of such an attack. The ROE should be designed to remove any legal or semantic ambiguity which could lead a commander inadvertently to violate national policy by underreacting or overreacting to some foreign action.

C. Legal Purposes. ROE represent operational guidance, including that required for self-defense, which allows the commander to do whatever is necessary to achieve his military task within the constraints of stated national policy. ROE thus are a major tool for ensuring that a commander's actions stay within the bounds of national and international law.

D. What ROE are Not. Under this JCS definition, ROE should not delineate specific tactics, should not cover restrictions, should not set forth service doctrine, tactics or procedures. ROE should never be "rudder orders" and certainly should never substitute for a strategy governing the use of deployed forces, in a peacetime crisis or in wartime.

2104 **THE RIGHT OF SELF-DEFENSE.** The U.N. Charter recognizes that all nations enjoy the inherent right of individual and collective self-defense against armed attack. All peacetime ROE are premised on the right of self-defense. This right has two distinct purposes: protecting the command and protecting the nation. Most peacetime ROE contain a warning to the effect that "nothing in these rules is intended to limit the commander's right of self-defense." This simply means that the ROE do not address the right to protect the individual, the commanding officer, the unit commander and his command from attack or from threat of imminent attack, in situations involving localized conflict, or in low-level situations that are not preliminary to prolonged engagement. Those situations are always covered by the inherent right of unit self-defense. Rather peacetime ROE provide guidance on when armed force can be used to protect the larger national interests, such as the territory of the United States, or to defend against attacks on other U.S. forces not under your command.

A. U.S. Doctrine. U.S. doctrine on self-defense, set forth in the JCS Peacetime ROE, provides that the use of force in self-defense against armed attack, or the threat of imminent armed attack, rests upon two elements:

1. Necessity, i.e., that a use of force must be in response to a hostile act or hostile intent; and

2. Proportionality, i.e., that the use of force be in all circumstances limited in intensity, duration, and scope to that which is reasonably required to counter attack or threat of attack and to ensure the continued safety of U.S. forces.

B. Self-Defense Defined. Contrary to popular misperception, peacetime ROE do NOT require a commander to "take the first hit" before acting in self-defense. Neither the law nor general peacetime ROE require commanders to wait until the opposing force has fired upon them. The legal standard for the use of armed force in self-defense is the same whether to protect the individual, a ship or aircraft, or the nation. First, there must be a situation requiring the use of force (i.e., necessity) and, second, the amount of force used must be proportional to the situation giving rise to the necessity. The requirement of necessity, or present danger, obviously arises when an armed attack occurs. However, the right of self-defense may also involve the use of armed force against a threat of imminent attack. In either case, proportionality requires that the use of force be limited in intensity, duration and magnitude to what is reasonably required to counter the attack or threat of attack. In peacetime, force may never be used with a view to inflicting punishment for acts already committed. Reprisals may be authorized only by the NCA.

C. Hostile Acts and Hostile Intent

1. Hostile Act. A hostile act is simply the actual use of armed force - attacking. The commission of a hostile act gives rise to the right to respond with the use of proportional force in self-defense by all authorized means available.

2. Hostile Intent. Hostile intent is the threat of the imminent may lead to the force being declared hostile. Whether or not a force is declared hostile, where the hostile intent amounts to a threat of imminent attack, the right exists to use proportional force in self-defense by all authorized means available.

D. Pursuit. ROE frequently provide rules regulating the pursuit of hostile forces. The legal limits of pursuit in self-defense should not be confused with the law of the sea (LOS) concept of hot pursuit in a law enforcement context.

1. Self-Defense Pursuit. Self-defense pursuit, often called immediate pursuit, properly refers to pursuit of hostile forces initiated in response to and in defense against the hostile acts of those forces. Pursuit does not have to be undertaken immediately; but pursuit may be lawfully taken only so long as the hostile force is an immediate threat to one's forces. Frequently the ROE will impose geographical restraints, such as prohibiting pursuit into the territory of neutral countries, or even into the territory of the hostile force, to minimize risk of escalation.

2. Hot Pursuit. Frequently it is stated that pursuit must be continuous and immediate. At sea those restrictions are not legally required to

pursue in self-defense. Rather, the requirement for continuous and immediate pursuit derives from the LOS right of "hot pursuit" set forth in article 23 of the 1958 High Seas Convention. The right of hot pursuit only relates to a coastal state's attempts to enforce its domestic laws against foreign ships violating those rules in the coastal state's internal waters, territorial sea, and contiguous zone. (The U.S. Coast Guard Peacetime ROE extends this to fisheries zones and over the continental shelf.) Hot pursuit may not be begun on the high seas, yet that is where pursuit in self-defense usually begins and is exercised. Obviously then, hot pursuit is generally irrelevant in maritime self-defense ROE, and is clearly distinguishable from self-defense pursuit.

E. Other Self-Defense Actions. Customary international law has long recognized that there are circumstances during time of peace when nations must resort to the use of armed force to protect their national interests against unlawful or otherwise hostile actions by other nations. A number of legal concepts have evolved over the years to sanction the limited use of armed forces in such circumstances (e.g., intervention, embargo, maritime quarantine). To the extent that such concepts have continuing validity under the U.N. Charter, they are premised on the broader principle of self-defense.

2105 **ANTICIPATORY SELF-DEFENSE.** Included within the inherent right of self-defense is the right of a nation (and its armed forces) to protect itself from imminent attack. Inter-national law recognizes that it would be contrary to the purposes of the U.N. Charter if a threatened nation were required to absorb an aggressor's initial and potentially crippling first strike before taking those military measures necessary to thwart an imminent attack. Anticipatory self-defense involves the use of armed force where there is a clear necessity that is instant, overwhelming, and leaving no reasonable choice of peaceful means.

2106 **JCS REQUIREMENTS.** Volume I of the Joint Strategic Capabilities Plan (JSCP) routinely provides that commanders will establish and maintain ROE in conformity with law and rules issued by higher authority applicable to their areas of responsibility. Proposed ROE for situations not covered by existing rules and revisions of existing rules are to be submitted to the JCS for review and approval. ROE for U.S. maritime forces are to be consistent with those approved for NATO maritime forces. Whenever possible, ROE are to be standardized for use by all major commands to facilitate movement between those commands. The Joint Operations Planning System (JOPS)(volume I) provides a format for the ROE appendix to the operations annex of all unified and specified commanders' operations plans.

A. Compilation of ROE. The JSCP also requires the unified and specified commanders and COMRDTJTF to compile all rules (and changes thereto) for their commands in formats such as instructions, letters, operation plans, or messages. The compilations are to be prepared no later than 1 October each year and provided

to the JCS, Service Chiefs, the commanders of other affected unified and specified commands and others if affected, and to commanders of other unified specified commands or COMRDJTF upon request if unaffected. A typical unified commander's compilation would list the commander's central document promulgating his basic peacetime ROE, plus any special ROE contained in his operations plans.

B. Review of Compilation of ROE. The JCS assure appropriate Joint Staff and Service review of such compilations and changes thereto, including a legal review by the Services, to assure consistency of the ROE with applicable domestic and international law, including the law of armed conflict.

C. Structure of ROE. ROE should be structured in accordance with JOPS. Basic peacetime ROE, which are to serve as an unambiguous guide for the commander in the conduct of his mission, should be declarative, that is, written as actions which define both the conditions and limits of that conduct. In addition, there should be available a series of supplemental measures that may be implemented to expand the authority of, or relax the restrictions on, the commander when the situation exceeds the bounds of the general case.

D. Content of ROE. Depending on the level of the promulgating commander and the contemplated circumstances of application, ROE should contain appropriately generalized or specific guidance on the employment of systems and platforms for surveillance, targeting and ordnance delivery. ROE may define the conditions for employment of the systems and platforms, but should not define specific tactics. All ROE should contain political and military policy guidance as well as guidance on those areas of international and domestic law that are subject to misinterpretation. They should not cover safety-related restrictions.

E. Subject Matter of ROE. ROE may be general and comprehensive, so as to constitute part of the fighting instructions of a fleet, and in this case they must envisage a range of contingencies. Or they may be issued specifically for a particular operation. Peacetime ROE cover such matters as general maritime operations, interception and engagement of aircraft, and defense operations for specific locations.

2107 **CONCLUSION.** Although they do not, and cannot cover all possible situations that may be encountered by the naval commander at sea, the JCS Peacetime ROE provide definitive guidance for U.S. military commanders for the use of armed force in self-defense commensurate with international law and U.S. national security objectives. A principal tenet of those ROE is the responsibility of the commander to take all necessary and appropriate action for his unit's self-defense. Subject to that overriding responsibility, the full range of options are reserved to the National Command Authorities to determine the response that will be made to hostile acts and demonstrations of hostile intent. As noted in the preceding paragraphs of this chapter, those options may involve nonmilitary as well as military measures. For additional reading, consult NWP-9 (Rev. A) and Captain

J. A. Roach, "Rules of Engagement," Nav. War C. Rev., Jan.-Feb. 1983, at 49, on which this chapter was largely adapted. Then study your commander's ROE.

CHAPTER 22

DRUG INTERDICTION

2201 REFERENCES

- A. Posse Comitatus Act (PCA), 13 U.S.C. § 1385
- B. 10 U.S.C. §§ 113, 371-378, as amended by Sect. 1210, National Defense Authorization Act for FY 90-91, Pub. L. 101-189.
- C. 14 U.S.C. § 89 [PCA inapplicable to US Coast Guard]
- D. DoD Directive 5525.5 series
- E. SECNAVINST 5820.7 series

2202 **INTRODUCTION.** Although the posse comitatus concept forbids military authorities from enforcing, or being directly involved with the enforcement of civil law, some military activities in aid of civil law enforcement may be authorized under the military purpose doctrine. For example, indirect involvement or assistance to civil law enforcement authorities which is incidental to normal military training or operations is not a Posse Comitatus Act violation. For more information on these restrictions, see the "Posse Comitatus" chapter in this Deskbook. In addition, Congress has specifically authorized the limited use of military facilities, platforms, and equipment to assist Federal authorities in the interdiction at sea of narcotics and other controlled substances.

2203 **DOD MISSION IN DRUG INTERDICTION.** The National Defense Authorization Act of 1989, Pub. L. 100-456 [10 U.S.C. § 113 note], assigned DoD as single lead agency responsible for coordinating all detection and monitoring of aerial and maritime transit of illegal drugs into the United States. It also directed DoD to integrate U.S. command, control, communications and intelligence (C3I) assets dedicated to drug interdiction into an effective communications network. [10 U.S.C. § 374 note].

2204 **USE OF U.S. NAVY SHIPS.** Consistent with congressional direction, U.S. Navy ships operating in waters designated by SECDEF (in consultation with the Attorney General) as a drug-interdiction area are required to have embarked a Coast Guard officer who is trained in law enforcement and who has power to arrest, search, and seize property or persons suspected of violations of U.S. law. In consonance with the right of the flag state under international law to exercise jurisdiction over vessels flying its flag, a U.S. Navy ship with an

appropriately authorized Coast Guard officer on board may approach and stop, anywhere in international waters or in U.S. national waters, any U.S. flag vessel which, on reasonable grounds, is believed to be engaged in the illicit traffic of narcotics or psychotropic substances. In such circumstances, any search, seizure or arrest will be accomplished by the embarked Coast Guard officer.

2205 FOREIGN VESSELS. Foreign flag vessels encountered by U.S. Navy ships in the U.S. territorial sea or contiguous zone under circumstances indicating that the vessel may be engaged in illegal drug traffic may be similarly approached and stopped, and boarded by the embarked Coast Guard officer.

A. International Waters. In international waters, foreign flag vessels may be boarded and, if warranted, seized for drug-interdiction purposes only under one or more of the following circumstances:

1. With flag state consent;
2. in hot pursuit originating in the U.S. territorial sea or contiguous zone; or
3. if the vessel is the mother ship of one or more craft operating in the U.S. territorial sea or contiguous zone.

B. Consent. In addition, a vessel in international waters may be boarded with the consent of the master, but seizure may only occur under one of the foregoing circumstances. Foreign-flag nation consent may consist of a bilateral agreement covering all such encounters or may be granted by that nation for the particular occasion. In all drug interdiction cases involving seizure of a foreign flag vessel beyond 12 nautical miles from the U.S. coast, concurrence must be obtained through the Department of State.

2206 MOU BETWEEN DOD, COAST GUARD, AND THE CUSTOMS SERVICE. The following MOU, signed 25 May 1989, provides an overview of DoD's detection and monitoring role in the war on drugs.

**SUBJECT: DEVELOPMENT AND IMPLEMENTATION OF
DETECTION AND MONITORING**

I. PURPOSE. This memorandum sets forth the mutual understanding of the signatory agencies as to their involvement in the detection and monitoring of suspected aerial and maritime transit of illegal drugs into the United States.

II. BACKGROUND. The drug interdiction process is composed of a number of functions and activities ranging from initial detection through monitoring/tracking to apprehension and prosecution. In the FY 1989 National

Defense Authorization Act, the Department of Defense was designated single lead agency of the federal government for such detection and monitoring. The DoD role as dingle lead agency will be to conduct and coordinate detection and monitoring surveillance activities to eliminate unnecessary duplication and maximize interdiction success. This Memorandum of Understanding will not address any functions, relationships, or activities related to apprehension or the subsequent aspects of the drug interdiction process. The following definitions will serve as the common basis for the planning, scheduling and executing of detection and monitoring.

DETECT - To determine the presence by visual or electronic means of aircraft or vessels suspected of transporting/trafficking illegal drugs into the United States. NOTE: An intelligence tip that indicates the actual or intended location of an aircraft or vessel potentially facilitates but does not constitute detection.

MONITOR - Maintain continuous knowledge of the location of suspect aircraft or vessel. The process can be accomplished through active, passive or a combination of these means.

ACTIVE MONITORING - Maintaining awareness of the location of an aircraft or vessel by physically (either clandestinely or overtly) trailing the suspect. NOTE: Non-DoD agencies charged with drug interdiction normally consider this to be "tracking".

PASSIVE MONITORING - Maintaining awareness of the location of an aircraft or vessel through electronic means. NOTE: Conducting simultaneous active and passive monitoring is possible and probable.

SORTING - The dynamic, interactive process involved in differentiating unknown/suspected drug transporting/trafficking aircraft or vessels from legitimate aerial or maritime traffic. This process begins with initial detection or tip on the presence of an unknown/suspect and ends with the final determination (often resulting after search of a suspected trafficker) of legitimacy and the feedback of this information to all involved parties. All involved agencies have distinct and complementary roles to play in this process.

TRACKING - Same as active monitoring.

INTERCEPT - Establish a position relative to vessels or aircraft from which identification and/or activities or the intercepted vehicle can be determined/monitored either visually or electronically.

APPREHENSION - The act of performing an enforcement stop of a

vessel or landed aircraft; taking into custody the vehicle, illegal contraband, other implicated conveyances, and the persons involved in transporting the contraband (search, seizure, and arrest).

DETECTION AND MONITORING ASSET - An asset that is suitably equipped to perform aerial or maritime surveillance, either visual or electronic. A number of multimission capable aerial/maritime platforms could conceivably be utilized to perform a detection and monitoring function if a priority operational need existed and the owning agent made the asset available. However, for the purposes of developing a detection/surveillance plan, helicopters/fixed wing aircraft and vessels that would normally be used for active monitoring/track and/or apprehension will not be considered.

III. RESPONSIBILITIES With the fullest recognition that the aforementioned agencies each contribute an integral part to the successful accomplishment of detection and monitoring and that the accomplishment of detection and monitoring is inherent in the interdiction process, we, the undersigned, agree that the execution of this multiagency effort will be facilitated by agreement and recognition of the following:

A. The Department of Defense is the single lead agency for the accomplishment of detection and monitoring of suspected aerial and maritime transit of illegal drugs into the U.S. As such, DoD has the responsibility to conduct detection and monitoring activities and to coordinate and integrate the multiagency effort.

B. The DoD, U.S. Coast Guard, U.S. Customs Service, and the intelligence agencies will be jointly responsible for determining illegal drug detection and monitoring requirements. The law enforcement agencies will play a major role in establishing detection and monitoring requirements. The responsibility for the drug interdiction program, exclusive of detection and monitoring for which DoD has responsibilities as annotated above, will remain with law enforcement agencies.

C. The successful accomplishment of this difficult task is dependent in large part upon effective coordination between all involved. To that end, U.S. Coast Guard and the U.S. Customs Service will designate representatives to serve as liaison officers with military staffs to facilitate continuous coordination. In addition, DoD will assign personnel to law enforcement Command, Control, Communications and Intelligence Centers to facilitate communications between all involved and to ensure positive hand-off of suspected vessels and aircraft.

D. Other agencies will provide detection and monitoring assets as

requested by DoD to the extent possible. They will also play a major role in determining detection and monitoring requirements and submit these determinations to the appropriate DoD element for coordinated response.

E. DoD elements will keep the United States Coast Guard and the Customs Service advised of action contemplated on all detection and monitoring requirements.

F. In order to effect an interactive planning and execution process, it is necessary for the regional/local representatives of the aforementioned agencies to conduct continual dialogue.

G. The National Air and Maritime Interdiction Strategy and the Defense in Depth Strategy will serve as a useful basis for the development of iterative detection and monitoring surveillance plans.

H. In order to achieve the effective and efficient implementation of a detection and monitoring surveillance plan it is necessary for the signatory agencies to make available those detection and monitoring assets under their control so that they may be incorporated into a detection and monitoring plan which avoids unnecessary duplication of effort. Non-DoD detection and monitoring assets will be made available for finite periods as pre-agreed between DoD and affected agencies on a case-by-case basis.

I. The success of this effort is largely dependent upon mutual trust and understanding between all involved. This spirit must be conveyed to the regional/local representatives of the signatory agencies to assist in fostering the necessary cooperation and coordination at the operational level to effect real improvement in the detection and monitoring aspects.

J. Conflicts arising between agencies in the implementation of this agreement will be resolved at the lowest possible operational or management level, or referred through appropriate channels for resolution.

K. This understanding becomes effective upon signature. Proposals for modification or rescission of this understanding will be subject to consultation by all signatories.

2207 **ROLE OF THE SJA.** The increased emphasis on military involvement in drug interdiction, as well as changes in the law and its interpretation, make this a dynamic area of practice. In response, JAG has formed inter- and intra-service attorney working groups to analyze and comment on legislative proposals and other initiatives to increase military involvement in counter-narcotics operations, and to review proposed regulations for compliance with current law and policy. Our judge advocates provide legal advice to Navy commands responding to requests from

civilian law enforcement agencies for use of naval personnel and equipment in the war on drugs. Many of these requests raise issues of first impression. As DoD involvement in counter-narcotics operations increases, we can anticipate a growing demand for legal services in this area.

2208 SCOPE OF DOD DRUG INTERDICTION SUPPORT.

In addition to its assigned counternarcotic mission focused on the "detection and monitoring of aerial and maritime transit of illegal drugs," DoD may become involved in U.S. counternarcotic policy in three other ways.

A. DoD Support to Civilian Law Enforcement Agencies (CLEAs). DoD has specific statutory authority to support certain activities of United States civilian law enforcement agencies (CLEAs). This support role has both a domestic and an international application.

B. DoD Support to State Department Counternarcotic Efforts. DoD has authority to support State Department international narcotics control activities under the Foreign Assistance Act.

C. DoD Support For Non-CLEAs. Under the general authority of the Economy Act and the Intergovernmental Cooperation Act, DoD may support other federal, state and local agencies which have a counternarcotic role even though the agencies are not CLEAs.

2209 DOD'S DOMESTIC SUPPORT ROLE

A. General Assistance in Support of Federal, State and Local CLEAs. Under 10 U.S.C. §§ 371-374, DoD may:

1. Provide information gained during normal military training or operations; consider the information needs of CLEAs when planning normal training or military operations; share intelligence with CLEAs;

2. Provide equipment, supplies, parts, and facilities;

3. Make personnel available to train and advise CLEAs;

4. Make personnel available to maintain equipment; and

5. Operate equipment "for purposes other than" those described in the Act "only to the extent that such support does not involve direct participation by such personnel in a civilian law enforcement operation unless such direct participation is otherwise authorized by law."

B. Operating Equipment

1. In support of federal (but not State and local) CLEAs under 10 U.S.C. § 374(b), DoD may:

- a. Make personnel available to operate equipment for a federal CLEA with responsibility for drug, immigration, customs or maritime law enforcement; OR
- b. Make personnel available to operate equipment for a federal CLEA with respect to assistance that such agency is authorized to furnish to a state or local government which is involved in the enforcement of laws similar to federal drug laws customs law, immigration law, and maritime law.

2. Personnel made available to support CLEAs under this authority may operate equipment for these purposes:

- a. Detection, monitoring, and communication of the movement of air and sea traffic;
- b. aerial reconnaissance; and
- c. operation of equipment to facilitate communications for CLEAs.

C. Operating Equipment Outside the Land area of the United States.

In support of federal (but not State and local) CLEAs under 10 U.S.C. §§ 374(b) and 379, personnel made available to support CLEAs may operate equipment for these purposes:

1. Interception of vessels or aircraft detected outside the land area of the United States for purposes of communicating with them and directing them to go to a location designated by appropriate civilian officials. Personnel may continue to operate this equipment to pursue these vessels or aircraft into the land area of the United States in cases where the detection began outside such land area;

2. With the joint approval of SECDEF and the Attorney General, DoD may provide transportation for federal CLEA personnel and operate a base of operations for them "in connection with a law enforcement operation outside the land area of the United States";

3. As provided for by SECDEF and SECTRANS, Coast Guard personnel may be assigned aboard naval vessels in "drug interdiction areas" outside

the land areas of the United States for the purpose of performing law enforcement duties in connection with drug smuggling into the United States. [The term "land area of the United States" is literal and includes territories, commonwealths and possessions (10 U.S.C. § 374(b)(4)(B)). This exceptional authority permits DoD to operate combat aircraft and vessels in confrontation with civilians. This authority may be exercised in support of federal CLEAs in United States territorial seas and international waters only. Additional authority is needed to provide this support in foreign countries or the territorial seas of foreign countries.]

D. Restrictions on Support DoD may Provide to CLEAs. Under 10 U.S.C. §§ 375 and 376:

1. DoD personnel may not conduct any activity which includes or permits "direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity" unless otherwise authorized by law.

2. DoD may not provide any support which will adversely affect military preparedness.

E. Reimbursement Considerations

1. Policy. Fiscal law principles require that the costs attributable to the support DoD provides to CLEAs be reimbursed by CLEAs unless:

- a. The support is provided in the normal course of military training or operations;
- b. the support results in a benefit to DoD which is "substantially equivalent" to that which would otherwise be obtained from training or operations; OR
- c. the support is provided in accordance with special appropriations [Congress appropriated \$40 million for SECDEF to provide "additional support" to federal agencies which have "counter-drug responsibilities" during FY 1990].

2. Federal Reimbursement. Support provided to federal CLEAs which does not provide training or operational benefit to DoD and is not "additional support" must be reimbursed. The mechanism for reimbursement is the Economy Act. The Economy Act requires that the providing agency be fully reimbursed for all direct and indirect costs associated with the goods and services it provides to the other agency unless otherwise provided by law. The Economy Act also requires reimbursement for pay and allowances and all costs associated with DoD's

preparation of an asset for other agency use. There should be no residual cost to DoD's appropriations for any support provided. 10 U.S.C. § 377(a); 31 U.S.C. § 1535; 57 Comp. Gen. 674 (1974).

3. State and Local Reimbursement. Support provided to state and local CLEAs which does not provide training or operational benefit to DoD must be reimbursed. 10 U.S.C. § 377(a). The mechanism for reimbursement is the Intergovernmental Cooperation Act which requires "payment of pay and all other identifiable costs of providing the services" requested by an agency. 31 U.S.C. § 6505. Under DoD Directive 7230.7, DoD is required to charge applicable rates for non-DoD users of DoD assets. Charges may be waived or reduced when full payment by a state or local government would not be in the best interest of the program (paragraph D.3.b.(2)). The assignment of Coast Guard personnel aboard surface naval vessels for law enforcement purposes (10 U.S.C. § 379 is provided for under separate interagency transaction authority which permits interaction between the Navy and Coast Guard without reimbursement. 10 U.S.C. § 2571.

2210 DOD'S INTERNATIONAL SUPPORT ROLES

A. General. DoD has two support roles with respect to U.S. international counternarcotic policy:

1. Federal CLEAs (the Drug Enforcement Administration (DEA), Federal Bureau of Investigation (FBI) or the Coast Guard) assist foreign governments with international efforts to combat narcotic production and trafficking. These agencies also assist foreign governments with their counternarcotic laws. DoD may support these federal CLEAs activities under 10 U.S.C. § 374(b)(1)(B).

2. The State Department provides assistance under the Foreign Assistance Act to countries and international organizations involved in counternarcotic efforts under the International Narcotics Control Act, 22 U.S.C. §§ 2291-2291h. DoD may support this State Department effort under 22 U.S.C. § 2392(b) and (c).

B. International Support of Federal CLEAs. General assistance in support of federal CLEAs authorized to assist foreign governments is virtually identical to the permissible activities discussed above for domestic support. The domestic prohibition concerning direct participation in civil law enforcement, however, is inapplicable outside the United States.

1. Operation of Equipment. In support of federal CLEAs authorized to assist foreign governments, and for purposes identical to those discussed above for domestic support, DoD may:

- a. Make personnel available to operate equipment for a federal CLEA with responsibility for drug laws (See 21 U.S.C. § 873(b)); OR
- b. Make personnel available to operate equipment, with respect to assistance that such agency is authorized to furnish a FOREIGN government which is involved in the enforcement of laws similar to United States federal drug law, immigration law, customs law, and maritime law.

2. Operating Equipment Outside the Land Area of the United States.

SECSTATE coordinates all U.S. assistance to support international efforts to combat illicit narcotics production or trafficking" in the land area or territorial seas of a foreign country. Personnel made available to support CLEAs under 10 U.S.C. §§ 374(b) and 379 may operate equipment for these purposes:

- a. Interception of vessels or aircraft detected outside the land area of the U.S. for purposes of communicating with them and directing them to go to a location designated by appropriate civilian officials; continue to operate this equipment to pursue these vessels or aircraft into the land area of the U.S. in cases where the detection began outside such land area. 10 U.S.C. § 374(b).

- b. With the joint approval of SECDEF, the Attorney General and SECSTATE, provide transportation for federal CLEAs personnel and operate a base of operations for them "in connection with a law enforcement operation outside the land area of the United States." 10 U.S.C. § 374(b).

- c. As provided for by SECDEF and SECTRANS, Coast Guard personnel may be assigned aboard naval vessels in "drug interdiction areas" outside the land areas of the United States for the purpose of performing law enforcement duties in connection with drug smuggling into the United States. [This authority permits DoD, in coordination with SECSTATE, to operate equipment in support of federal CLEAs with authority to assist cooperative efforts to combat international narcotic production and trafficking and to assist foreign countries enforce their counternarcotic laws in their country, territorial seas or in international waters.]

3. Restrictions. The Posse Comitatus Act and 10 USC 375 do not apply in foreign countries, their territorial seas or international waters. Consequently, the primary restriction on this support is that it may not adversely affect readiness. Also if DoD support is provided to assist a federal CLEA in any foreign police action with respect to narcotics control efforts, restrictions under the Mansfield Amendment to the Foreign Assistance Act are applicable. 22 U.S.C. § 2291(c). The same reimbursement considerations apply here as in the case of domestic support discussed above.

C. DoD's Support of State Department Efforts. The State Department provides international narcotics assistance to foreign governments and international organizations under the Foreign Assistance Act, 22 U.S.C. § 2291. The President has delegated his authority under § 2291(a) to SECSTATE to furnish assistance to any country or international organization, on such terms and conditions as he may determine, for the control of illegal drugs. SECSTATE is "responsible for coordinating all assistance provided by the United States government to support international efforts to combat illicit narcotics production or trafficking." Under the Foreign Assistance Act, "suppression of international narcotics trafficking is among the most important foreign policy objectives of the United States."

1. Powers. Under this authority, the State Department may:

- a. Conclude agreements with foreign countries to "facilitate control of the production, processing, transportation, and distribution of [illegal drugs]";
- b. spray herbicides to eradicate drug crops; and
- c. transfer to foreign countries "any property seized by or otherwise forfeited to the United States Government in connection with narcotics-related activity" [The foreign country must have contributed to the seizure in some way to be eligible.]

2. Costs. The State Department and the participating foreign country share the costs. A foreign country "should bear an appropriate share of the costs of any narcotic control program, project, or activity" for which U.S. assistance is provided. These costs may be borne by "in-kind" contributions from the foreign country.

3. Restrictions on DoD Support. The Mansfield Amendment to the Foreign Assistance Act is applicable only when U.S. personnel participate in foreign police actions. It prohibits certain police-type actions by "officers and employees of the United States" except in special situations enumerated below.

- a. DoD personnel may not "directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts, notwithstanding any other provision of law" 22 U.S.C. § 2291(c)(1);
- b. With the "approval of the United States chief of mission," the § 2291(c)(1) restriction does not prohibit DoD personnel from "being present when foreign officers are effecting an arrest or from assisting foreign officers who are effecting

an arrest";

- c. Nor does the § 2291(c)(1) restriction prohibit DoD personnel "from taking direct action to protect life or safety if exigent circumstances arise which are unanticipated and which pose an immediate threat to U.S. or foreign officers or government employees, or members of the public."
- d. If a foreign country agrees, the § 2291(c)(1) restriction will not apply with respect to "maritime law enforcement operations in the territorial sea of that country."
- e. DoD personnel may not "interrogate or be present during the interrogation of any United States person arrested in any foreign country with respect to narcotics control efforts without the written consent of such person." 22 U.S.C. § 2291(c)(5).
- f. These prohibitions do not apply to DoD personnel who are carrying out U.S. responsibilities under applicable SOFAs.

4. Police Training Prohibition. The Foreign Assistance Act prohibits spending funds appropriated for the act to train, advise, assist, support or equip "police, prisons, other law enforcement forces . . . or any program of internal intelligence or surveillance" of a foreign country. 22 U.S.C. § 2420. This prohibition applies to any training provided under the Foreign Assistance Act. This restriction does not apply to:

- a. Assistance under Chapter 8, Part I, International Narcotics Control, Foreign Assistance Act;
- b. sharing crime statistics and other information with foreign governments;
- c. "any authority of the DEA or FBI which relates to crimes of the nature which are unlawful under the laws of the United States";
- d. "assistance, including training, in maritime law enforcement and other maritime skills";
- e. "a country which has a longstanding democratic tradition, does not have standing armed forces, and does not engage in a consistent pattern of gross violations of internationally recognized human rights"

- f. when specifically waived or otherwise made inapplicable by Congress

5. Reimbursement. The Foreign Assistance Act contains its own interagency transaction authorities which require supporting agencies to be reimbursed by State Department per a specified standard. 22 U.S.C. §§ 2385(a) and 2392(b), (c). The standard is "replacement cost, or if required by law, at actual cost, or, in the case of services procured from DoD to carry out chapter 8 of part I [International Narcotics Control], the amount of the additional costs incurred by DoD in providing such services, or at any other price authorized by law and agreed to by the owning or disposing agency" determined as follows:

- a. Items from stock are reimbursed at replacement cost.
- b. Military Airlift Command (MAC) transportation is reimbursed at actual cost (required by a separate law).
- c. Services, other than MAC airlift, are reimbursed at the additional costs incurred by DoD to provide the services.

2211 **DOD'S SUPPORT ROLE FOR OTHER AGENCIES.** The Economy Act, 31 U.S.C. § 1531, is free standing general authority for any federal agency to provide goods and services to another federal agency on request and by mutual agreement. The agreement must include the details of reimbursement. The Intergovernmental Cooperation Act accomplishes a similar purpose for federal transactions with state or local governments. As a practical matter, the transfer of goods or services to a federal, state or local agency, other than a CLEA or the state Department, in support of the U.S. counternarcotic policy will be a rare event. An agency which does not have a counternarcotic law enforcement mission, however, may be involved in the counternarcotic policy. For example, the CIA does not have a counternarcotic civil law enforcement mission but may have an intelligence collection role in international counternarcotic operations. The transfer of goods and services to any federal, state or local agency which is not a CLEA will be subject to restrictions placed on that agency's activities and subject to law enforcement restrictions applicable to members of the Armed Forces of the United States.

2212 **INTEGRATION OF DOD'S ROLES.** Each of the roles discussed above have a statutory basis. The law establishes the kinds of operations DoD can conduct, specific prohibitions of DoD activities and the requirement for and terms of reimbursement for DoD support. The challenge is to obtain the maximum results from DoD efforts by integrating the different roles. Coordinating these DoD roles will require close interagency evaluation of operations and legal and comptroller advice on each operation. In each operation, SJAs must help ensure that DoD activities are accomplished under proper authority, within the restrictions of law, and are reimbursed as required.

CHAPTER 23

INTELLIGENCE OPERATIONS AND OVERSIGHT

2301 REFERENCES

- A. SECNAVINST 3820.3C
- B. DoD Directive 5240.1 of 3 December 1982
- C. DoD Directive 5240.1-R of 7 December 1982
- D. Exec. Order No. 12,333, "United States Intelligence Activities," 4 December 1981

2302 **BACKGROUND.** SECNAVINST 3820.3C implements the other references listed above and confirms SECNAV's unequivocal authority and responsibility for Navy intelligence oversight and to promulgate policies and procedures governing: the collection, retention, and dissemination of information concerning U.S. persons and the conduct of intelligence activities by DoN intelligence components; and the assignment of responsibility for intelligence oversight functions within DoN. This chapter seeks to familiarize the SJA with the important provisions of intelligence operations and oversight activities.

2303 **SCOPE OF SECNAVINST 3820.3C.** While Executive Order 12333 and DoD Directive 5240.1 are primarily confined to activities which affect United States persons, SECNAVINST 3820.3C covers all DoN intelligence activities. Further, the Instruction covers intelligence units that support unified or specified commands, intelligence staffs, offices supporting military commanders at all levels, and other DoN military personnel and civilian employees when they are engaged in intelligence activities even though they may not be assigned to an intelligence unit. SECNAVINST 3820.3C does not, however, serve as the authority for any intelligence mission or function; that authority must be found in some other specific delegation document. Generally, specific authorizations for intelligence activities within the DoN are found in the organization's missions and functions documents. The Instruction serves as a standard regulating mechanism for those missions and functions, prescribing outer limits and procedural guidance to ensure all DoN intelligence activities are conducted lawfully. The Instruction does not apply, however, to law enforcement activities conducted by DoN intelligence components or to physical or personnel security investigations by NIS.

2304 DoN POLICY UNDER SECNAVINST 3820.3C

A. General. The collection of any information by a DoN intelligence component must:

1. Not infringe upon the constitutional rights of any U.S. persons;
2. Be based on an assigned function;
3. Employ the least intrusive lawful technique when collecting information about U.S. persons; and
4. Comply with all regulatory requirements of SECNAVINST 3820.3C and other related laws, regulations and instructions.

B. Special Activities. Special activities are activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the U.S. Government is not apparent or publicly acknowledged. The term does not include activities which are intended to influence U.S. political processes, public opinion, or media, and do not include diplomatic activities or the collection and production of intelligence or related support functions. DoN intelligence activities are prohibited from conducting or providing support to special activities" except in time of war or unless the activities have been approved by the President and directed by SECDEF. Only the CIA is authorized to conduct Special Activities, and it will do so only by expressed direction of the President. In addition, the instruction states specifically that "under no circumstances shall any DoN employee engage in or conspire to engage in assassination."

2305 DoD REGULATION 5240.1-R ORGANIZATION. D o D Regulation 5240.1-R is divided into "Procedures." Procedure 1 is introductory. Procedures 2 through 4 provide the sole authority by which intelligence components may collect, retain and disseminate information concerning U.S. persons. Procedures 5 through 10 set forth applicable guidance with respect to the use of certain collection techniques to obtain information for foreign intelligence and counterintelligence purposes. Finally, Procedures 11 through 15 govern other aspects of DoN intelligence activities including oversight of such activities.

2306 GENERAL PROVISIONS. Procedure 1 emphasizes that the purpose of these combined procedures is to enable intelligence components to perform their authorized functions effectively while ensuring activities affecting U.S. persons are carried out in a manner that protects their constitutional rights and privacy. Procedure 1 provides for the referral of all questions of interpretation to the cognizant

legal office, i.e., OJAG. Requests for exception to the Procedures must be referred to the Deputy Under SECDEF for policy via JAG. Procedure 1 also charges DoN intelligence activities with the responsibility of providing details related to potential crimes uncovered during the course of lawful intelligence activities to appropriate law enforcement agencies.

2307 COLLECTION OF INFORMATION ABOUT U.S. PERSONS UNDER PROCEDURE 2

A. "Collection" Defined. Under DoD Regulation 5240.1-R, information is collected "only when it has been received for use by an employee of a DoD intelligence component in the course of his official duties." Thus, "collection" is officially gathering or receiving information and an affirmative act leading to use of that information. For example, information received from the FBI about a terrorist group is not "collected" unless and until that information is included in a report, entered into a data bank, or used in some other manner which constitutes an affirmative intent to use that information. Electronic data is "collected" only when processed into intelligible form.

B. "United States Person" Defined. "United States person" is a term of art which describes the class of persons most intelligence-related legal restraints are designed to protect. The term includes U.S. citizens, permanent resident aliens, U.S. corporations, and unincorporated entities comprised primarily of U.S. persons. Unless specific information to the contrary is obtained, persons or organizations outside the United States and aliens inside the United States shall be presumed not to be United States persons.

C. Prerequisites to Collection. Information which identifies a United States person may be collected by a DoN intelligence component *only* if the information is necessary to the conduct of a function assigned to that component *and* the information falls into one of the following categories:

1. Publicly available information.
2. Information about a person who consents to its collection.
3. Information necessary for administrative purposes.
4. Overhead reconnaissance not directed at specific U.S. persons.
5. Information arising out of a lawful personnel, physical, or communications security investigation.

6. Information concerning persons who are reasonably believed to be potential sources of assistance to intelligence activities for the purpose of determining their suitability or credibility.
7. Information needed to protect the safety of any persons or organizations.
8. Information about a U.S. person who is reasonably believed to be engaged in international narcotics activity.
9. Information can be collected about a U.S. person if necessary to protect foreign intelligence or counterintelligence methods from unauthorized disclosure, provided that the person in question has access to, had access to, or is otherwise in possession of information concerning foreign intelligence or counterintelligence sources and methods. Within the United States, intentional collection of such information shall be limited to persons who are present or former DoD employees; present or former intelligence agency contractors or their present or former employees; or applicants for any such employment or contracting.
10. Information constituting counterintelligence may be collected about a U.S. person if there is a reasonable suspicion that person is engaged in, or about to engage in, intelligence on behalf of a foreign power, or international terrorist activities. Information may also be collected about persons in contact with an individual described in the preceding sentence for the purpose of identifying such persons and assessing their relationship with said individual.
11. Subject to very stringent limitations, particularly within the U.S., information may be collected about a U.S. person if the information constitutes foreign intelligence. To constitute foreign intelligence, the person about whom information is sought must, in general, be acting for a foreign power, involved with international terrorism or international narcotics traffic, prisoners of war, missing in action, or victims or targets of terrorists. Such information may be collected only by overt means unless the head of the DoD intelligence component concerned, or his single designee approves, after indicating that certain specified conditions are met.

2308 HANDLING QUESTIONABLE INFORMATION.

If an agency receives information which is not "collectible," the information should not be accepted; if already accepted, the agency should burn the document, erase the data, purge it from the system, etc. If the information pertains to the functions of another governmental agency, it may be sent to such agency for possible use. If doubt exists about the collectibility of a particular piece of information, the agency must seek a "collectibility determination." An agency is authorized to retain the information temporarily in its files for up to 90 days pending the receipt of such a determination. No dissemination is permitted, except directly to a collectibility determination authority. Legal determinations may be made with the assistance of a supporting SJA or OJAG (Code 015) Special Programs Office.

2309 OTHER POLICY CONSIDERATIONS. Procedure 2 makes three important policy points.

A. The collection of information relating to U.S. persons is *not* authorized solely because of lawful domestic activities which are opposed to government or administration policy.

B. Regardless of where collected and the category of the information, collection of information about U.S. persons must be accomplished by the *least intrusive means* possible (as discussed below).

C. Within the United States, "Foreign Intelligence Information" concerning U.S. persons may only be collected by overt means, unless specific written approval had been granted by DNI, COMNAVINTCOM, DIRINT, (Marine Corps) or the commander of the counterintelligence elements of the Naval Investigative Service Command for some alternative means of collection.

2310 RETENTION OF INFORMATION. Procedure 3 governs the kinds of information about the United States persons that may knowingly be retained by a DoN intelligence component without the consent of the person whom the information concerns.

A. Retention Defined. "Retention" means more than merely retaining information in files; it is retention plus retrievability by reference to the person's name or other identifying data. Where retention of information is required for administrative purposes, or where such retention is required by law or court order, the rules and restrictions of Procedure 3 do not apply. In addition, information acquired prior to 1 December 1982, the effective date of E.O. 12333, may be retained without screening so long as retention was in compliance with applicable law and previous executive orders. An intelligence component cannot circumvent the spirit

of this rule by simply filing uncollectible or unauthorized information about U.S. persons in a manner not retrievable by reference to the person's name or other identifying data.

B. Deletion of Information. DoN does not retain information about U.S. persons if not necessary to an ongoing mission or function. If necessary, a DoN intelligence component may delete the names of U.S. persons from some files, and substitute generic terms or symbols in their place, but only when retention of the documents is otherwise necessary. When a DoN intelligence component is advised that information is not collectible pursuant to a Procedure 2 collectibility determination, then that information must be removed from the component's files.

C. Incidentally Acquired Information. To be retainable, incidentally acquired information on U.S. persons must first have been collectible under one of the Procedure 2 categories as if it were intentionally acquired. The information must also fall under one of three additional criteria:

1. The information must be necessary to understand or assess foreign intelligence or counterintelligence;
2. the information must be either foreign intelligence or counterintelligence which has been collected from electronic surveillance; OR
3. the information must be incidental to other authorized collection and indicates some involvement in activities that may violate Federal, State, local, or foreign law.

D. Duration of Retention. Duration of retention is governed by SECNAVINST 5210.8B, or other specific records management instructions for unique functions e.g., SECNAVINST 3820.2D. Access to retained information is limited to those with a need to know.

2311 DISSEMINATION OF INFORMATION

A. Procedure 4. Procedure 4 governs the criteria for dissemination of information about U.S. persons, without their consent, which a DoN intelligence component has collected and retained. If consent has been given, dissemination is permitted consistent with that consent. Procedure 4 does not apply to information collected solely for administrative purposes or dissemination pursuant to law or a valid court order. Nor does it justify dissemination in violation of the Privacy Act.

B. Dissemination Determinations. Dissemination determinations involve a two-step process. First, the holder of the information must make a determination that the prospective recipient will use the information for a lawful Government function, and that the information is needed by the prospective recipient for that particular function. Once this threshold test is met, then the information must fit into one of five categories before it may be disseminated without consent. Any dissemination beyond the permissible limits of Procedure 4 must be approved in advance by the OJAG or OGC, following coordination with the DoJ and the DoD General Counsel. If the prospective recipient is:

1. A DoD employee or contractor, the information must be needed in the course of that employee's official duties.
2. a federal, state or local law enforcement entity, the information must indicate involvement in activities which may violate laws that entity is responsible to enforce.
3. an agency within the intelligence community, the information may be disseminated without advance determination of potential need to allow the prospective recipient agency to determine its relevancy.
4. a non-law enforcement, non-intelligence agency of the federal government, then the information must be related to the performance of a lawful government function of that agency.
5. a foreign government, then the information must be authorized for dissemination and undertaken pursuant to an agreement or other understanding with that government.

2312 **RULE OF THE LEAST INTRUSIVE MEANS.** This rule prescribes the hierarchy of increasingly intrusive collection techniques which must be considered before an intelligence component engages in collection of information. First, to the extent feasible, information must be collected from publicly available materials, or with the consent of the person or persons concerned. Next, if collection from these sources is not feasible, then cooperating sources may be used. Third, if neither publicly available information nor cooperating sources are sufficient or feasible, then collection may be pursued using other lawful investigating techniques which require neither a judicial warrant nor the approval of the Attorney General of the United States. Finally, when none of the first three approaches has been sufficient or feasible, then the collecting intelligence component may seek approval for use of one of the techniques which require a warrant with the approval of the

Attorney General.

2313 LIMITATIONS ON COLLECTION OF FOREIGN INTELLIGENCE. Where special collection techniques are employed in the United States, foreign intelligence concerning U.S. persons may be collected only where the information sought is significant, coordination has been effected with the FBI, and the use of other than overt means has been approved by the head (or designee) of the intelligence component concerned.

2314 JURISDICTION IN COUNTERINTELLIGENCE INVESTIGATIONS. Where counterintelligence investigation are involved, coordination with the FBI is not required if the subject of the investigation is solely under the Navy's investigative jurisdiction. These include active duty Navy personnel and investigations of incidents involving Navy reservists which occurred while on active duty. Though not required, in most cases coordination may be desired to ensure thoroughness of results.

2315 ELECTRONIC SURVEILLANCE. Procedure 5 is confined to electronic surveillance activities of DoN intelligence components for foreign intelligence and counterintelligence purposes, domestic counterintelligence purposes, and to certain technical aspects of electronic surveillance which are closely allied with foreign intelligence collection and counterintelligence activities. The policies, procedures, and restrictions governing interception of wire and oral communications in the use of pen registers and related devices for law enforcement purposes, both in the United States and abroad, are covered by other instructions, e.g., SECNAVINST 5820.7 and OPNAVINST 1620.2. Procedure 5 applies to the following DoN intelligence activities:

A. All electronic surveillance conducted **WITHIN** the United States to collect "foreign intelligence information";

B. all electronic surveillance conducted **OUTSIDE** the United States by DoN intelligence components, for intelligence and counterintelligence purposes, and directed against U.S. persons who under the circumstances have a *reasonable expectation of privacy*.

C. signals intelligence activities, by elements of the Department of the Navy signals intelligence components, that involve collection, retention, and dissemination of foreign communications in military tactical communications;

D. Navy intelligence use of electronic equipment for technical surveillance countermeasures purposes;

E. developing, testing and calibration by DoD intelligence components, of electronic equipment, that can be used to intercept or process communications and noncommunications signals;

F. training of personnel by DoD intelligence components in the operation and use of electronic communications and surveillance equipment; and

G. the conduct of vulnerability and hearability surveys by DoD intelligence components.

2316 **FISA.** Procedure 5 implements the Foreign Intelligence Surveillance Act of 1978, (FISA) 50 U.S.C. § 1801 et seq. FISA covers certain intelligence activities in the United States; the requirements of DoD Regulation 5240.1-R, however, extend beyond those boundaries to any and all electronic surveillance of U.S. persons outside the United States carried out by any DoN intelligence component, regardless of target, location or purpose.

A. **FISA Requirements.** FISA requires a judicial warrant authorizing the following activities WITHIN the United States for foreign intelligence or counterintelligence purposes, before such an activity may begin:

1. the acquisition of a wire or radio communications sent to or from the U.S. by intentionally targeting a known U.S. person in the U.S. under circumstances in which the person has a reasonable expectation of privacy and where a warrant would be required for law enforcement purposes;

2. a wire tap to intercept a wire communication, such as a telephone, telegraph, teleprinter, facsimile and digital communications;

3. radio intercepts of private radio transmissions in which all of the communicants are located within the U.S.; and

4. the use of any electronic, mechanical or other monitoring devices to acquire information other than a wire communication or radio communication under certain circumstances under which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

B. **FISA Judges.** Under the FISA, the Chief Justice of the U.S. Supreme Court designates seven U.S. district court judges, each of whom will hear applications for and grant orders (i.e. warrants) approving electronic surveillance under the Act. FISA further provides for the Chief Justice to designate three additional judges from the U.S. district court, or courts of appeals, to sit as a special

appellate court to hear appeals by the United States from denials of application made by any one of the seven District Court judges. Finally, under the FISA the Government may further appeal denials from the special appellate court to the Supreme Court.

2317 OBTAINING FISA WARRANTS. The Navy obtains its FISA warrants, as do other Federal agencies, through the U.S. Attorney General. All DoN requests are coordinated with OJAG and OGC, and must be submitted through the DoD General Counsel to the Attorney General.

2318 ELECTRONIC SURVEILLANCE. "Electronic surveillance" is acquisition of a nonpublic communication by electronic means without the consent of a person who is a party to an electronic communication or, in the case of a nonelectronic communication, without the consent of the person who is visibly present at the place of the communication. Electronic surveillance is either consensual or nonconsensual. Nonconsensual electronic surveillance involves the concept of a reasonable expectation of privacy; consensual does not. The regulatory framework of Procedure 5 may be further subdivided into nonemergency and emergency situations, situations which occur within or outside the United States, and activities which affect U.S. persons or non-U.S. persons. No approval is required for consensual surveillance; the approval required in various nonconsensual scenarios is discussed below.

A. In the United States. Activities directed at any U.S. person or other person inside the U.S. must be approved by the FISA court upon a showing that probable cause exists to believe that the target is a foreign power or agent thereof and that the targeted place is about to be used by that power or agent. In emergency situations, activities may be authorized by the Attorney General's certification in writing that the targeted surveillance is communications exclusively between and among foreign powers and that the targeted place is under open and exclusive control of a foreign power. Even in emergency circumstances, all such requests must be submitted through the chain of command for approval by the Attorney General. Electronic surveillance in these cases must be preceded by the approval by the Attorney General, pending securing a FISA warrant within 24 hours.

B. Outside the United States

1. U.S. Persons. In non-emergency situations, the Attorney General may authorize nonconsensual electronic surveillance where necessary to obtain significant foreign intelligence or counterintelligence information which is not available through less intrusive means and based upon probable cause that the target is a:

- a. Person involved in clandestine intelligence activities, sabotage, or international terrorism on behalf of a foreign power;
- b. an officer or employee of a foreign power;
- c. a person unlawfully acting for a foreign power;
- d. a corporation or other entity owned or controlled by a foreign power; or
- e. a person in contact or collaboration with a foreign power's intelligence or security service for purposes of providing access to U.S. classified information or material.

2. Emergency Situations. In emergency situations, nonconsensual electronic surveillance may be directed at U.S. persons abroad at the order of: SECDEF; Deputy SECDEF; SECNAV; Under SECNAV; the Director, National Security Agency (NSA); the Deputy Director for Operations, NSA; or a general or flag officer at the overseas location in question, having responsibility for either the subject of the surveillance, or responsibility for the protection of persons, installations, or property endangered. Exercise of approval in these circumstances is limited to cases where securing approval of the Attorney General is not practical because:

- a. The time required would cause failure or delay in obtaining significant foreign intelligence or counter-intelligence and such a failure or delay would result in substantial harm to the national security;
- b. A person's life or physical safety is reasonably believed to be in immediate danger; or
- c. The physical security of a defense installation or government property is reasonably believed to be in immediate danger.

3. Non-U.S. Persons. Nonconsensual electronic surveillance may be directed at non-U.S. persons abroad to support any lawful function assigned to the Navy intelligence component, regardless of whether an emergency situation exists.

2319

SIGNALS INTELLIGENCE ACTIVITIES

A. Certain DoN elements are a part of the United States signals intelligence system. The US SIGINT system is the unified organization for US SIGINT activities under the direction of the Director, National Security Agency/Chief, Central Security Service (DIRNSA/CHCSS) is comprised of the NSA/CSS, the components of the military services authorized to conduct SIGINT activities, and certain other activities authorized by the National Security Counsel or SECDEF to conduct SIGINT collection, processing and/or dissemination activities.

B. All U.S. SIGINT operations are conducted by the authority of the DIRNSA/CHCSS who maintains direct contact with the Attorney General for the purposes of securing emergency approval for 9electronic surveillance lie., nonconsensual) under the FISA and for the purposes of securing warrants from the FISA court.

2320

DEFINITIONS OF SIGINT

A. DoD Regulation 5240.1-R defines SIGINT as "a category of intelligence including communications intelligence, electronic intelligence, foreign instrumentation signals intelligence, either individually or in combination."

B. "Generic" SIGINT is a broad category of intelligence which includes, but is not limited to, nonconsensual electronic surveillance. SIGINT encompasses much more than nonpublic communications. It includes the interception of public communication signals and of other noncommunications electronic signals.

C. However, for the purposes of SIGINT activities under SECNAVINST 3820.3C and the underlying regulatory and statutory framework, Procedure 5 only governs certain nonconsensual electronic surveillance activity. Specifically, it covers only those SIGINT activities which involve the collection, retention, and dissemination of foreign communications and military tactical communications. Therefore, Procedure 5 does not apply to SIGINT activities to collect public communications and noncommunications electronic signals.

2321

INCIDENTAL ACQUISITION OF INFORMATION ABOUT U.S. PERSONS

A. Because SIGINT collection activities are so extensive, they may accidentally involve the acquisition of information concerning U.S. persons without their consent, and the interception of communications originated or intended for receipt in the United States, without the consent of a party to the communication.

Because of the pervasive difficulty, if not impossibility, in discriminating between signals in such a manner as to preclude "electronic surveillance" of U.S. persons, the underlying regulatory control system reaches to and controls all SIGINT activities which are directed toward nonpublic communications, even those characterized as foreign. The system presumes those communications are protected under the Fourth Amendment, and thus requires action of the law whenever there is a reasonable potential that there will be incidental acquisition of a U.S. person's communications.

B. For the purposes of SIGINT, communications concerning a U.S. person are those in which a U.S. person is identified in the communications. A U.S. person is identified when that person's name, unique title, address or other personal identifier is revealed in the communication in the context of activities conducted by that person or activities conducted by others and belated to that person. [U.S. person for SIGINT purposes is defined slightly differently.]

2322 APPLICABILITY OF THE FISA TO SIGINT.

The FISA applies to any SIGINT activity involving communications sent to or from the United States in which the communicants have a reasonable expectation of privacy; to any wiretap for SIGINT purposes in the United States; to the acquisition of private radio signals where all communicants are located in the United States; and to the use of SIGINT devices within the United States.

2323 CONTROL AND OVERSIGHT OF SIGINT OPERATIONS. The policies and procedures for the control and oversight of SIGINT operations are contained in various US SIGINT system directives (USSID) pertaining to SIGINT activities and organizations within the US SIGINT system. General guidance is published in USSID 18, the distribution of which is strictly controlled and limited to those organizations within the US SIGINT system which have a need to know.

2324 TECHNICAL SURVEILLANCE COUNTERMEASURES.

TSCM refers to the use of electronic surveillance equipment, or electronic or mechanical devices solely determining the existence and capability of electronic surveillance activity being attempted by unauthorized persons, or for determining susceptibility of electronic equipment to such unlawful electronic surveillance, e.g., detecting "bugs," "wiretaps," etc. TSCM activity, may be undertaken only following authorization or consent of the official or commander in charge of the installation, facility or organization which is the object of such services. TSCM services must be limited in duration to the minimum time required to accomplish the specific TSCM mission and access to the informational contents of communications acquired during any particular TSCM activity must be strictly controlled. DoD Instruction 5240.5; DoD Directive 5200.19; OPNAVINST C5510.93D.

2325 DEVELOPING, TESTING AND CALIBRATING EQUIPMENT. The regulation of activities pertaining to developing, testing, and calibration of electronic equipment under DoD Regulation 5240.1-R reaches to the protection of communications signals in the laboratory environment. The parameters of signals and types of signals which may be used are limited in such a manner as to ensure the protection of any communicant's reasonable expectation of privacy, even where use and acquisition of the underlying signals carrying those protected conversations are in a laboratory context.

2326 TRAINING ACTIVITIES. The training of personnel in the operation and use of electronic communications and surveillance equipment is also regulated by DoD Regulation 5240.1-R. Procedure 5 covers three specific areas: training guidance, training limitations, and the retention and dissemination of information collected during training.

2327 VULNERABILITY AND HEARABILITY SURVEYS. These surveys are signal security (SIGSEC) assessment techniques and are to be used only for communication security (COMSEC) purposes. "Vulnerability Surveys" refer to the acquisition of radio frequency propagation and its subsequent analysis to determine imperially the vulnerability of the transmission media to interception by foreign intelligence services. "Hearability Surveys" refer to monitoring radio communications to determine whether a particular radio signal can be received at one or more locations, and if reception is possible, to determine the quality of reception over time.

2328 CONCEALED MONITORING. "Concealed monitoring" is the subject of Procedure 6. Concealed monitoring is comprised of five essential elements. The first element is "targeting," i.e., the monitoring is being specifically directed against "a particular person or group of persons" and "without their consent." For the activity to be characterized as concealed monitoring, it must be done by "electronic, optical, or mechanical devices." Concealed monitoring must be conducted in a "surreptitious and continuous manner." Monitoring is surreptitious when it is targeted in a manner designed to keep the subject of the monitoring unaware of it. Monitoring is continuous if conducted without interruption for a substantial period of time.

2329 SCOPE OF CONCEALED MONITORING. N a v y intelligence components may use concealed monitoring only in connection with lawful operational activities designed to collect:

A. Foreign intelligence, i.e., information relating to capabilities, intentions, and activities of foreign powers, organizations, or persons; or

B. Counterintelligence, i.e., information gathered to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations, persons, or international terrorist activities (but not including personal, physical, document, or communications security programs information).

2330 TESTS FOR CONCEALED MONITORING.

To come within the ambit of Procedure 6, concealed monitoring must be conducted within the United States or be directed against a U.S. person outside the United States. Concealed monitoring of non-U.S. persons abroad may be conducted for any lawful function assigned to the specific DoN intelligence component. In addition, the person who is the subject of concealed monitoring under Procedure 6 must not have a reasonable expectation of privacy in the activities to be monitored. Within the context of Procedure 6, a reasonable expectation of privacy is the extent to which a reasonable person in a particular circumstance is entitled to believe his actions are not subject to monitoring by electronic, optical, or mechanical devices. [The presence or absence of this reasonable expectation of privacy is the most fundamental distinction between "concealed monitoring" and "electronic surveillance."] Thus, since no reasonable expectation of privacy is involved, no warrant would be required if similar activity were carried out for law enforcement purposes.

2331 AUTHORITY FOR CONCEALED MONITORING.

Requests for approval for concealed monitoring should be coordinated with the legal advisor to the approval authority. Within the Navy, approval authorities are: the Director, Naval Intelligence; the Director of Intelligence, U.S. Marine Corps; and the Director, Naval Security and Investigative Command. Delegation of this approval authority is not permitted.

2332 PHYSICAL SEARCHES. "Physical searches" are the subject of Procedure 7. DoN intelligence personnel have limited arrest powers, depending on the organization involved. Where lawful arrests are made, the arresting DoN intelligence personnel enjoy "search incident to arrest" powers to the same extent as any other law enforcement officer. Similarly, intelligence personnel may conduct a Terry pat-down/frisk for weapons as necessary while performing legitimate intelligence functions; reasonable suspicion is required and contraband found may be seized.

2333 MATTERS OUTSIDE THE SCOPE OF PROCEDURE 7.

The provisions of Procedure 7 are not intended to impinge upon the commander's authority (including commanders of DoN intelligence components) under the Military Rules of Evidence to authorize probable cause searches of persons and places under their control in exercising their law enforcement responsibilities and to conduct

searches and inspections under the appropriate circumstances. Procedure 7 does not restrict consensual searches or examinations of areas under the plain view doctrine, provided that view is not enhanced by technological means in a manner to invade a reasonable expectation of privacy. Nor does Procedure 7 govern examinations of abandoned property.

2334 NONCONSENSUAL PHYSICAL SEARCHES

A. In the United States. Under Procedure 7, searches may be conducted only for counterintelligence purposes and only of the person or property of active duty military personnel. Absent exigent circumstances, the search must be authorized by a military judge or a military commander under M.R.E. 315(d) and based on a finding of probable cause to believe the subject of the search is acting as an agent of a foreign power. Requests may be made of the FBI, or other law enforcement agencies to conduct other searches beyond this limited authority where necessary.

B. Outside the United States. U.S. persons do not forfeit fourth amendment protections while overseas. Using the same standards as for searches within the United States, searches of servicemembers may be authorized by appropriate officials under M.R.E. 315(d). For nonmilitary U.S. persons, the standards are the same, but approval must be obtained from the U.S. Attorney General. Nonconsensual physical searches of non-U.S. persons may be performed for any lawful function assigned to the searching Navy Intelligence activity.

2335 **SEARCHES AND EXAMINATION OF MAIL.** Procedure 8 applies to all mail opening and mail cover for any lawful function assigned to a DoN intelligence component. A letter, package, or other item becomes "mail" as soon as it enters the United States postal system, and it retains its character "mail" till it leaves that system, either by delivery to the intended addressee or the addressee's agent. Opening mail is a search for Fourth Amendment purposes.

A. First Class Mail. Intelligence components are prohibited from detaining or opening first class mail within U.S. postal channels for foreign intelligence or counterintelligence purposes, and from even requesting such action by the U.S. Postal Service. For postal regulation purposes, first class mail is considered sealed against inspection, and searches of first class mail on the U.S. postal channels may be authorized only for law enforcement purposes, including the limited law enforcement responsibilities of DoN intelligence components. First class mail may be searched pursuant to a lawful search warrant duly issued by a Federal court. Further, such mail may be detained, upon reasonable suspicion for a brief period of time to assemble evidence sufficient to satisfy the probable cause requirement for a search warrant and to apply for, obtain, and execute the warrant. DMM para. 115.31.

B. Other Mail. Second, third, and fourth class mail is termed not sealed against inspection, and may be detained, inspected or opened in a variety of legitimate circumstances by postal officials, including pursuant to an approved DoN intelligence component mail cover.

2336 **MAIL COVERS.** Mail cover means the process by which a record is made of any data appearing on the outside cover of any class of mail matter as permitted by law, other than that necessary for the delivery of mail or administration of the Postal Service. It also includes checking the contents of any second, third or fourth class mail to obtain information in the interest of: protecting national security; locating a fugitive; or obtaining evidence of commission or attempted commission of a crime. DoD Regulation 4525.6-M, Chap. 8 § I.8.a(3); U.S. Post Office Rules and Regulations 39 C.F.R. Part 233.

A. Authorization. Mail covers may be conducted pursuant to an order issued by an appropriate postal official based upon a written request from a law enforcement agency which contains a stipulation of the facts which demonstrate the required grounds. For the purposes of seeking mail covers, the counterintelligence elements of the DoN intelligence component are considered law enforcement agencies, but their jurisdiction is limited to counterintelligence matters with criminal law implications, such as espionage, sabotage, and international terrorism.

B. Overseas. DoD 4525.6-M provides that within the military postal system overseas, the senior military official who has responsibility for postal operations of each major command within each military service, may order mail covers within the geographic area of the command to which they are assigned. Limited delegation of this authority is authorized; however, delegation is not permitted to approve requests for covers on the grounds of national security. For other elements within the U.S. postal system, mail cover may be ordered pursuant to the authority of the chief postal inspector of the Postal Service, and according to procedures and standards specified in 39 C.F.R. § 233.3.

2337 **MILITARY POSTAL SYSTEM OVERSEAS.** The DoD Postal Manual, DoD 4525.6-M, provides that military commanders, including naval intelligence commanders exercising special court-martial jurisdiction, and military judges have the authority under M.R.E. 315 to authorize probable cause searches and seizures of all four classes of mail when such search or seizure is to occur within the military postal system overseas; such an order is not required for second, third, or fourth class mail. Judicial warrants to search first class mail in other portions of the U.S. postal system must be secured in a federal judicial proceeding pursuant to Rule 41 of the Federal Rules of Criminal Procedure. 39 C.F.R. § 233.3.

2338 **EMERGENCY SITUATIONS.** Within U.S. postal channels, any military postal clerk or postal officer or any person acting under the authorization of such a clerk or postal officer may detain, open, or remove from postal custody, and process and treat mail, of any class, reasonably suspected of imposing immediate danger to life or limb, or an immediate or substantial danger to property without a search warrant or authorization. This detention, however, is limited to the extent necessary to determine and eliminate the danger. A complete written report must be filed promptly.

2339 **MAIL OUTSIDE U.S. POSTAL CHANNELS.** Opening mail to or from U.S. persons found outside U.S. postal channels, including APO or FPO channels, is permitted only with the approval of the U.S. Attorney General based on probable cause that the subject of the search is acting as an agent for a foreign power. Where non-U.S. persons are involved, searches may be conducted for any lawful function assigned a DoN intelligence component. DoN intelligence components may also request mail cover of mail to or from a US person which is outside U.S. postal channels, or covers of non-US persons outside U.S. postal channels, per the appropriate law and procedure of the host government and any SOFA.

2340 **PHYSICAL SURVEILLANCE.** Procedure 9 covers physical surveillance of U.S. persons by intelligence components for foreign intelligence and counterintelligence purposes. The term "physical surveillance" has two alternative definitions; each contains four **essential** elements. If any element is not met, the activity is not subject to the provisions of Procedure 9.

A. First Alternative. Physical surveillance involves "systematic and deliberate observation." Systematic and deliberate means that the activity must be both methodical or done with purposeful regularity, *and* be intentional or premeditated. The surveillance must be "of a person," i.e., a natural person, not a corporation or similar entity. The physical surveillance may be conducted "by any means" and must be "on a continuing basis." On a continuing basis means conducted without interruption for a substantial period of time.

B. Second Alternative. Physical surveillance is alternatively defined as the acquisition of a non-public communication, by a person, not a party thereto or visibly present thereat, through any means, not involving electronic surveillance. The information need only be acquired; the two-fold Procedure 2 analysis for collection [collection plus action indicating intent to use] is inapplicable here. Non-public communication is difficult to define; its Procedure 9 meaning differs from its meaning under Procedure 5 for electronic surveillance purposes. If an activity contemplates acquisition of a communication in which the parties have a reasonable expectation of privacy, i.e., that the contents of their communication will remain

private, then it cannot be physical surveillance. [Where communications are concerned, a reasonable expectation of privacy must exist on the part of all communicants for the "sphere" to retain its protection from intrusion. If one communicant consents to governmental intrusion, then the fourth amendment rights of all communicants are effectively vitiated.] Information is "available publicly: if it has been published or broadcasted for general public consumption, is available on request for a member of the general public, could lawfully be seen or heard by a casual observer, or is made available at a meeting open to the general public. Thus, a non-public communication is a communication which is neither available for general public consumption nor lawfully available to the casual observer.

C. Physical Surveillance and Concealed Monitoring Compared.

Physical surveillance and concealed monitoring are similar. Concealed monitoring always involves the use of some electronic, optical or mechanical device; physical surveillance need not. Concealed monitoring must be surreptitious, while physical surveillance may be done with the subject's knowledge. Both are non-consensual, and there are some circumstances in which the techniques may overlap.

2341 PHYSICAL SURVEILLANCE WITHIN THE U.S.

DoN intelligence components may conduct nonconsensual physical surveillance of U.S. persons in the United States only for foreign intelligence and counterintelligence purposes, and only against persons within the investigative jurisdiction of the component conducting the surveillance.

A. These persons include:

1. present or former employees of the DoN intelligence component concerned;
2. present or former contractors of that DoN intelligence component, and their present or former employees;
3. applicants for employment with the DoN intelligence component concerned, or with the contractors of that component; and
4. military servicemembers.

B. Other Restrictions. DoN intelligence components may also conduct physical surveillance of a person in contact with any of the above subjects, but only to the extent necessary to identify that person. In addition, any physical surveillance of a U.S. person which occurs outside a DoD installation in the United States must be coordinated with the FBI, and other law enforcement agencies that may be

appropriate. DoN intelligence components may conduct physical surveillance of non-US persons within the United States for any lawful function assigned to that particular component, subject to the jurisdictional limitations imposed by "The agreement between the Deputy Secretary of Defense and Attorney General, April 5, 1979."

2342 PHYSICAL SURVEILLANCE OUTSIDE THE U.S.

Outside the United States, DoN intelligence components may conduct physical surveillance of the same U.S. person subjects as permitted within the United States, and of any other U.S. persons in the course of lawful foreign intelligence and counterintelligence investigations, subject to the following conditions:

A. Such surveillance must be consistent with the laws and policies of the host government, and may not violate any SOFA;

B. Any physical surveillance of a U.S. person abroad to collect foreign intelligence may be authorized only to obtain significant information that could not be obtained by other means; and

C. Physical surveillances may be conducted of non-U.S. persons abroad for any lawful function assigned to the DoN intelligence component concerned.

2343 THE NECESSITY FOR COVER ARRANGEMENTS. Cover arrangements of intelligence organizations are essential to the performance of their foreign intelligence and counterintelligence missions. By definition, however, cover dictates an element of deception which must be practiced within the United States as well as within foreign countries. In recognition of the risk of conflict with various regulatory statutes and other legal requirements, Procedure 10 contains a number of controls on cover arrangements which attempt to ensure compliance with applicable laws and to minimize governmental intrusion on individual privacy.

2344 UNDISCLOSED PARTICIPATION IN ORGANIZATIONS.

Procedure 10 applies to the participation as an official duty by DoN intelligence personnel in two broad categories of organizations: any organization located within the United States; and any organization outside the United States which qualifies as a "U.S. person." Under Procedure 10, participation is defined very broadly and includes virtually any action undertaken within the structure or framework of an organization. Procedure 10 does NOT apply to an individual's participation in an organization where it is *solely* personal, i.e., at the individual's own initiative and expense and not on behalf of the intelligence component. Participation is "on behalf of the intelligence component" only when the participant is asked to take some action within an organization for the benefit of the requesting agency. This rule obtains

even if the intelligence component may acquire some incidental benefit as a result of the individual's participation. Even if outside the pale of Procedure 10, however, activities must still be based on a legitimate mission requirement; intelligence components do not enjoy wholesale license to penetrate organizations outside the purview of Procedure 10.

2345 CONCEPT OF "US-PERSON ORGANIZATIONS"

A. Organization. For the purposes of Procedure 10, an organization can be virtually any group which has some sort of formal structure. Outside the U.S., Procedure 10 is concerned about those organizations constituting U.S. person organizations. Within the U.S., Procedure 10 applies both to U.S. person, and non-U.S.-person organizations.

B. U.S. Person Organization. A U.S. person organization is:

1. A unincorporated association substantially composed of U.S. citizens or permanent resident aliens; or
2. a corporation incorporated in the U.S., unless it is directed and controlled by a foreign government or governments. [A corporation, a branch, an office, or a corporate subsidiary, outside the United States, even if owned "wholly or partially" by a corporation incorporated in the U.S., is not a U.S.-person organization. Any organization which is located outside the United States may be presumed not to be a U.S.-person organization, unless specific information to the contrary is known to the DoN intelligence component.]

2346 **UNDISCLOSED PARTICIPATION.** Participation in an organization by DoN intelligence personnel on behalf of any entity in the intelligence community is permitted only if the participant's affiliation with naval intelligence is disclosed or unless the undisclosed participation is approved by proper authority.

A. Disclosure. When disclosure is required, it must be made to an organization's executive officer or to officials in charge of membership, attendance or the records of the organization. Disclosure on a membership application is sufficient to meet this requirement and the disclosure may be made by the individual's organization, or by some other component in the intelligence community that is otherwise authorized to take such action on behalf of naval intelligence.

B. Approval. The Commanding Officer may approve the following activities, recognizing that approval in these circumstances is limited to collection of significant foreign intelligence that is generally made available to participants at such meetings, and does not involve the domestic activities of the organization or its members:

1. Participation in meetings open to the public;
2. Participation where other persons acknowledged to the organization to be U.S. government personnel participate;
3. Participation in educational or professional organizations to enhance skills, knowledge, or capabilities; and
4. Participation in seminars, and similar meetings where disclosure of participants affiliations is not required.

C. Higher Approval Authority. Activities within the DoN intelligence component's mission but beyond the approval authority of the commanding officer must be approved by: the Deputy Under SECDEF (Policy); the Director, Defense Intelligence Agency (DIA); the Assistant Chief of Staff for Intelligence, Department of the Army; the Commanding General, U.S. Army Intelligence and Security Command; the Director of Naval Intelligence; the Director of Intelligence, U.S. Marine Corps; the Assistant Chief of Staff, Intelligence, U.S. Air Force; the Commander, Naval Security and Investigative Command; or the Commanding Officer, Air Force Office of Special Investigations. These officials may designate a single delatee to exercise this approval. Within the Navy, all requests in this category to engage in undisclosed participation must be submitted via OGC or OJAG.

2347 COOPERATING SOURCES. Procedure 2 defines "cooperating sources" as persons or organizations who knowingly and voluntarily provide information to intelligence components, or access to information, at the request of those components or on their own initiative. Examples include: law enforcement authorities, credit agencies, academic institutions, employers, and foreign governments. Neither Procedure 10 nor any other provision of DoD Regulation 5240.1-R seeks to restrict legitimate cooperation of persons with U.S. intelligence activities. Any information of potential value to the United States may be received from cooperating sources by DoN intelligence components and in instances where this information is not within the jurisdiction of the Navy, the information may be passed to an appropriate agency. If a cooperating source furnishes information to an intelligence component or one of its employees who is a participant in an organization with the cooperating source, this action is merely gratuitous unless the employee had

been given prior direction or tasking by the intelligence component to collect such information. This principle applies to family members, to members of organizations, associations, etc., and even to walk-in sources at the DoN intelligence offices.

2348 CONTRACTING FOR GOODS AND SERVICES.

Procedure 11 applies to contracting or other arrangements with United States persons for the procurement of goods and services by or for DoN intelligence components within the United States, and with contractors abroad who are U.S. persons. It does not apply to contracting with government entities.

2349 DISCLOSURE REQUIREMENTS

A. Disclosure to Academic Institutions. Prior to entering contracts with academic institutions, DoN intelligence components must disclose their sponsorship to appropriate officials of the institution.

B. General Exception to Disclosure Requirement. DoN intelligence components may enter contracts with commercial organizations, private institutions and individuals WITHOUT revealing their sponsorship IF the contract is for:

1. Published material available to the general public;
2. routine goods or services necessary for support of approved activities; or
3. other items incident to approved activities.

C. Approved Nondisclosure. In other contractual relationships, nondisclosure of DoN intelligence sponsorship must be supported by a written determination that concealment is necessary to protect the component's activities.

1. This determination may be made by: SECNAV; Under SECNAV; Director, NSA; Director, DIA; or Deputy Under SECDEF (Policy). For DoN intelligence components, requests to conceal sponsorship must be submitted per SECNAVINST S3810.5A and/or S5513.1B.

2. The form of such a written determination need not be a specific request generated under Procedure 11. In most cases, the determination will have been made in some other fashion, such as in the promulgation or directive. In addition, where activities are carried out pursuant to an operations plan which is approved by one of those officials, and that operations plan includes provisions for

concealed sponsorship of contracting or acquisitioning, the operations plan will satisfy this requirement.

2350 CONTRACTING METHODOLOGY. Procedure 11 does not affect government contracting methodology. In almost all cases, when an intelligence component contracts for goods and services it must follow the provisions of the Federal Acquisition Regulations (FAR) and implementing directives. Exceptions are permitted to this general rule on certain acquisitions using intelligence contingency funds (ICF) under SECNAVINST S7042.7F in approved special access programs (SAP) under SECNAVINST S5460.3A, i.e., a justified use of SECNAV's emergency and extraordinary expense authority.

2351 ASSISTANCE TO LAW ENFORCEMENT. Procedure 12 applies to the provision of assistance by Department of the Navy intelligence components to civilian law enforcement authorities, and it incorporates the specific limitations of such assistance contained in E.O. 12333, together with the general limitations of approval requirements of SECNAVINST 5820.7 and OPNAVINST 1620.2 relative to support to civilian law enforcement. These provisions apply to approved department of the intelligence resources in support of any federal, state and local civilian law enforcement agency. See generally "Posse Comitatus" in Chapter 42 of this Deskbook.

2352 EXPERIMENTATION ON HUMAN SUBJECTS. Procedure 13 implements the restriction in Executive Order 12333 that "[n]o agency within the intelligence community shall sponsor, contract for, or conduct research on human subjects, except in accordance with the guidelines issued by the Department of Health and Human Services." Suffice it to say, for the purposes of DoN intelligence components, human experimentation is not an option. DoN involvement in such activities is further regulated by SECNAVINST 3900.39.

2353 EMPLOYEE CONDUCT. Procedure 14 covers essentially three levels of "conduct" or responsibilities: individual, intelligence component and departmental. This Procedure sets forth the responsibility employees of DoN intelligence components to conduct themselves in accordance with DoD Regulation 5240.1-R, and other applicable policies, regulations, directives, and laws. It also provides, that intelligence components make sure that information of these policies, guidelines, laws and regulations are made known to the members of those components. Finally, Procedure 14 lays out six specific responsibilities which must be met by SECNAV as the Head of a DoD activity which contains intelligence components. These include insuring the free flow of employer reports of questionable activities, and insuring that sanctions are imposed on violators of regulations and instructions affecting intelligence components.

2354 IDENTIFYING, INVESTIGATING, AND REPORTING QUESTIONABLE ACTIVITIES

A. "Questionable Activity" Defined. Under Procedure 15, "questionable activity" refers to any conduct that constitutes, or is related to, an intelligence activity, that may violate the law, any Executive Order or Presidential Directive, including Executive Order 12333, or any applicable DoD or Navy policy including DoD 5240.I-R and SECNAVINST 3820.3C.

B. Reports. Any employee or servicemember assigned to an intelligence component has a basic responsibility to report any questionable intelligence activity. This responsibility is in addition to the general responsibility to report possible criminal activity. Within the Navy a questionable activity should be reported by message through the chain of command to OGC, OJAG, or the Navy or Marine Corps IG as appropriate. Procedure 15 requires that reports of questionable activity be submitted not later than 5 days after discovery and that each report be investigated to determine the facts and assess whether activity is legal and is consistent with applicable policy. The format for such reports is as follows:

1. Description and the nature of the questionable activity.
2. Date, time, and location of occurrence.
3. Individual or unit responsible for the questionable activity.
4. Summary of the incident to include references to particular portions of SECNAVINST 3820.3C, etc.
5. Status of the investigation of the incident.

2355 THE INTELLIGENCE OVERSIGHT FRAMEWORK

A. Congressional Oversight. The heads of departments with components involved in intelligence activities are required to keep congressional intelligence committees fully and currently informed of intelligence activities, including significant anticipated intelligence activities, and to report any illegal or improper intelligence activity along with any corrective action taken or planned. 50 U.S.C. § 413.

B. The President's Intelligence Oversight Board (IOB). The IOB was created in 1975 to establish an independent oversight process to monitor the intelligence community's compliance with the restrictions created by Executive Order

11,905. The IOB's powers are now found at Executive Order 12,334 of 4 December 1981, 46 F.R. 59955. The IOB informs the President of unlawful or improper intelligence activities; forwards reports of those activities to the Attorney General; reviews the internal guidelines of members of the Intelligence Community concerning the lawfulness of intelligence activities; reviews the intelligence oversight practices and procedures of the Inspectors General and General Counsels of the intelligence community; and conducts investigations necessary to carry out the above functions.

C. DoD. The Assistant to the Secretary of Defense (Intelligence Oversight) is the DoD conduit to the President's IOB. DoD Directive 5148.11 of 1 December 1982. The ASD(IO) reports directly to the Deputy SECDEF and is responsible for the independent oversight of all DoD intelligence activities for the purpose of ensuring their compliance with the applicable statutes, executive orders, and directives. The ASD(IO) reports at least quarterly to SECDEF and the IOB.

D. DoN. Intelligence oversight within DoN is guided by SECNAVINST 3820.3C. The Navy system, comporting with the presidential and DoD systems, establishes reporting procedures for the Navy intelligence community and permits the Navy Inspector General, Navy General Counsel, and the Judge Advocate General to identify questionable intelligence activities and report them to the ASD(IO) and IOB.

1. CNO and CMC. CNO and CMC are responsible for ensuring that SECNAV, the Under SECNAV, Assistant SECNAV (RE&S), Navy General Counsel, and the Judge Advocate General are provided an annual listing of DoN intelligence components and kept informed of all intelligence activities; and identifying to the Navy IG, the Marine Corps IG, General Counsel and JAG, other DON units which engage in intelligence activities.

2. IG. The Navy IG and the Marine Corps IG for Marine Corps intelligence components are primarily responsible for inspecting DoN intelligence components and investigating reports of questionable activities. The Navy and Marine Corps IGs submit a Quarterly Intelligence Oversight Report (QIOR) to the ASD(IO) via JAG, Navy General Counsel, and the Under SECNAV. The QIOR identifies intelligence activities determined to be improper, lists significant intelligence oversight activities that took place that quarter, and contains any suggestions for improving the intelligence oversight process. The IGs of the DoN intelligence components are responsible for carrying out the responsibilities assigned in DoD Directive 5240.1-R; ensuring reports are made to Navy General Counsel, Navy or Marine Corps IG, and JAG; and assisting the Navy and Marine Corps IGs as required.

3. Navy General Counsel and the Judge Advocate General. The Navy General Counsel and JAG are principally responsible for determining whether

questionable activities are, in fact, unlawful or improper.

4. OJAG Special Programs Office. In February 1988 the JAG Special Programs Office was made a Division within OJAG. The division supports JAG in carrying out his intelligence responsibilities. The new status reflects the growing importance of legal issues that affect our intelligence and operational clients. The Division has three specially cleared judge advocates and a civilian secretary who have developed needed expertise. The Judge Advocate General, the Deputy Judge Advocate General, and Assistant and Deputy Assistant Judge Advocates General who discharge "Special Programs" responsibilities attend the monthly breakfasts sponsored by the Standing Committee and follow the work of that Committee. The division maintains close professional contacts among the general counsel offices of the various intelligence agencies and departments within the executive branch. The Special Programs Division also supports DoJ in civil litigation on classified matters, such as assertion of the State Secret privilege. In February 1990, SECNAV revised SECNAVINST 5000.34A, the directive governing the oversight of sensitive activities within the Department of the Navy. Examples of such activities include counter-terrorist training activities and sensitive support of counter-narcotics law enforcement efforts. The directive designates the Special Programs Division as one of two principal sources for legal advice to field judge advocates or commanders conducting, contemplating, or supporting sensitive activities.

5. Quarterly Intelligence Oversight Review Board. The Quarterly Intelligence Oversight Review Board is composed of the Under SECNAV, the Navy IG, Navy General Counsel and JAG. Summaries of existing and potential intelligence activities of significance, or which may contravene legal constraints, are required to be submitted to the Board by the Director of Naval Intelligence and the Director of Intelligence, USMC.

CHAPTER 24**TERRORISM****2401 REFERENCES**

- A. Memorandum of Understanding Between Department of Defense, Department of Justice, and the Federal Bureau of Investigation, Subj: USE OF FEDERAL MILITARY FORCE IN DOMESTIC TERRORIST INCIDENTS.
- B. DoD Directive 2000.12 of 12 Feb 1982 and 16 July 1986, Protection of DoD Personnel and Resources Against Terrorist Acts.
- C. Arts. 0802 and 0826, U.S. Navy Regulations, 1990
- D. FMFM 7-14, Combating Terrorism (5 Oct 90)

2402 INTRODUCTION. The development of an effective legal regime to control and reduce terrorist violence will provide one of the greatest challenges to the world community in the 1990s. Unfortunately, it is not only radical groups which must be considered. Covert state involvement has emerged as the chosen instrument for a new and vicious pattern of international bargaining. At the same time, nations will continue to be hampered in preventing and suppressing terrorist violence, as a collective body, because of their inability to reach agreement on those acts which should be condoned as political responses by the weak against the powerful in unjust political relationships. The political element of terrorist violence differentiates it from common criminal activity.

2403 DEFINING TERRORISM. International terrorism is the premeditated, politically motivated violence perpetrated against non-combatant targets in or from a second state by sub-national groups or individuals. International terrorism is defined to have the following elements: (1) a subversive, violent act or threat thereof in a foreign state or against a foreign national; (2) an intended political outcome which might include expansion of political control or political change; and (3) a target, whether civilian or material, whose death, injury, or destruction can be expected to influence the desired political outcome. State involvement or direction of terrorist activity adds an additional element.

2404 **STATE-SPONSORSHIP OF TERRORISM.** State-supported international terrorism refers to those countries that support international terrorist groups or engage in terrorist attacks to influence policies of other countries, to establish or strengthen their regional or global influence, and, in some cases, to eliminate or terrorize dissident exiles and nationals from adversary countries. state involvement in terrorist activity is dictated by practical as well as ideological considerations. The strategic thinking involved incorporates the view that terrorism is a suitable substitute for traditional warfare when that warfare becomes too risky or too expensive. State-sponsored terrorism is truly "war on the cheap." State support can include propaganda and political support, funding, intelligence, training, and supply of weapons at one end of the spectrum, and direct covert involvement at the other.

A. Growth. The factor contributing most to the increase in state-supported terrorism for political change in the synergistic or multiplier effect it has in its impact. Its low cost and limited training and weapons requirements make it a strategy ideally suited for less sophisticated states. Like other forms of low-intensity warfare, terrorism is ambiguous. The fact that it throws victim nations off-balance and that they must then grope for an appropriate means of response only increases its effectiveness.

B. The Legal Context. Even if state support can be clearly identified, placing it in a legal context has proven difficult. France and Venezuela, for example, do not distinguish between individual and group terrorism and state-supported terrorism. The former defines all terrorism as "heinous acts of barbarism," while the latter considers terrorism to include any act that "endangers or takes innocent human lives, or jeopardizes fundamental freedoms."

C. Law of Armed Conflict. By relating state involvement in the terrorist use of force to an effort to change national political imperatives in another state, however, the law of armed conflict is invoked and the right of self-defense triggered. The law of armed conflict is that branch of international law, often called the law of war, which regulates the conduct of states and combatants engaged in armed hostilities, at whatever level of intensity.

2405 **LEGAL RESPONSE TO TERRORISM.** An effective counter-terrorism strategy must ensure that enforcement measures are not legally constrained and that those responsible for terrorist acts are consistently held accountable for their behavior. To this end, the Western nations have worked with concerned regional and international organizations to develop a matrix of conventions addressing such terrorist related issues as hostage-taking, aircraft hijacking, and extradition. This expanding body of international law, when coupled with

increasingly more effective national implementing legislation, appears at last to be arming the victims of terrorism with some of the legal instruments necessary to combat the threat.

A. Background. It was not until the assassination at Marseilles on October 9, 1924, of King Alexander of Yugoslavia and Mr. Louis Barthou, Foreign Minister of the French Republic, that the world community began an intensive consideration of international terrorism at the official level. This concern led to the Convention for the Prevention and Punishment of Terrorism, concluded at Geneva under the auspices of the League of Nations on November 16, 1937. Twenty-three states undertook to treat as criminal offenses acts of terrorism -- including conspiracy, incitement, and participation in such acts -- and, in some cases, to grant extradition for such offenses. In a supplementary convention signed on the same day, ten of the twenty-three participants of the principal convention agreed to the creation of an International Criminal Court to which the parties would be entitled to hand over the accused if they decided neither to extradite nor prosecute in their own courts. Unfortunately, only two states ratified either of these Conventions and they never went into force. States were reluctant to ratify because of the breadth of the definition of terrorism, a problem which continues today in the drafting of international agreements on the subject. Under the 1937 Convention, terrorism was defined broadly to include criminal acts directed against a state and intended to create a state of terror in the minds of particular persons, or a group of persons, or the general public.

B. OAS Convention. Where the 1937 Geneva Convention failed, two subsequent conventions addressing the protection of diplomats and other internationally protected persons from terrorist attacks succeeded. The Inter-American Convention on the Kidnapping of Diplomats, which concluded in Washington on February 2, 1971, was called by the Organization of American States (OAS) as a result of an extreme number of political kidnappings in Latin America. Activist political groups had repeatedly kidnapped high-ranking foreign diplomats and businessmen in an attempt to force political concessions from the various national governments. Although the 1971 Convention was organized by the OAS, states from outside the region were invited to participate. The operative articles focus on punishment of specific acts through national legislation and agreement on the extradition of offenders. Special emphasis is given to the classification of all condemned acts as serious common crimes not permitting political offender treatment or the granting of asylum. The Convention creates, much in the same manner as the conventions on genocide, slavery, and piracy, a new category of international crimes against humanity punishable by any member state regardless of the locus of the crime.

C. U.N. Action. Two years after the drafting of the OAS Convention, the United Nations General Assembly adopted, by resolution, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents. This 1973 Convention addressed serious crimes such as murder, kidnapping, or other attack on diplomats and other internationally protected persons. The key provision, Article 7, requires prosecution in cases where extradition is denied. This provision is nearly identical to similar provisions in the Hague and Montreal Conventions dealing with aircraft hijacking.

1. U.N. Charter and Other Declarations. In other areas as well, the United Nations has succeeded in promulgating principles of human rights which leave no doubt that international terror violence is a violation of acceptable world community norms. The United Nations Charter provides for the promotion and encouragement of respect for human rights. The Universal Declaration of Human Rights, adopted by the United Nations in 1948, further provides that "[e]veryone has the right to life, liberty and security of person," and that "[n]o one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment." The preamble to the International Covenant of Civil and Political Rights, which entered into force in 1977 absent United States ratification, emphasizes the individual's right to enjoy "freedom from fear." Article 6 of this Covenant declares that every individual has the right to life, and that "[n]o one shall be arbitrarily deprived of his life." Preservation of life and related values often the target of terrorism are similarly addressed in the U.N. sponsored 1948 Genocide Convention. Prohibited acts under that Convention include (a) killing members of a group; (b) causing either serious bodily harm or severe mental distress to a particular group; (c) deliberately inflicting conditions on a group calculated to bring about its physical destruction in whole or in part.

2. Work Remaining. Despite these successes, the United Nations has been unable to legislate in three areas historically considered exclusive of international criminal jurisdiction. The first category includes just wars against aggression, struggles for self-determination or national liberation, and struggles by the oppressed against the oppressor. The second area includes terrorist attacks on combatants, on non-combatants where directly involved in the conflict, and on military targets. The third area of legal exclusion includes propaganda strategies and acts of reprisal.

2406 **PROSECUTION AND EXTRADITION.** While customary international law, at least until recently, probably did not require the prosecution or extradition of terrorists whose acts fell within one of the above three categories, the Western nations, including the United States, have persistently pressed for international agreements which would do so. Among international organizations, the

International Civil Aviation Organization (ICAO) has enjoyed the greatest success in implementing effective counter-terrorism procedures.

A. The Tokyo Convention. The 1963 Tokyo Convention, sponsored by ICAO, provided clarification on jurisdiction over crimes in the air, for prompt restoration of aircraft and cargo to its rightful owner, and for the speedy resumption of an interrupted flight. Despite these provisions, nowhere in the Convention was "hijacking" defined or listed as a crime, and nowhere was it provided that the state where the hijacked craft landed required to prosecute or extradite the perpetrators.

B. The Hague Convention. The Hague Convention of 1970 remedied some of these remaining concerns. At the Hague, ICAO members carefully defined those offenses associated with hijacking, while at the same time requiring that contracting states extradite or punish hijackers, leaving the choice to the state's discretion. The delegates at the Hague failed to state what they meant by their call for "severe penalties" for aircraft hijacking, however. They also failed to adopt measures dealing with aviation offenses committed on the ground or with criminal interference with navigation facilities and service. These matters were left to the Montreal Convention which convened the following year.

C. The Montreal Convention. The 1971 Montreal Convention greatly increased the scope of activities covered by the Tokyo and Hague Conventions. It expanded protection to cover the period between the start of pre-flight preparation and a termination point 24 hours after landing. It also added coverage to include destruction or damage to air navigational facilities. What none of the Conventions addressed, however, was an effective mechanism to impose sanctions upon states which refused to extradite or prosecute aerial terrorists.

D. Sanctions. Although a Sanctions Conventions was proposed jointly by the United States and Canada at the 1973 ICAO meetings, member states were unable to agree on the criteria to be used or the measures to be imposed. The greatest success concerning sanctions against nations not adhering has been achieved by the seven leading Western nations in their annual Economic Summit Conferences. Beginning with the Bonn Conference in 1978, the Western leaders, representing Canada, the United States, Federal Republic of Germany, France, Italy, Japan, and the United Kingdom, have annually addressed issues related to mutual cooperation in reducing terrorism and hostage-taking. Since 1978, for example, these nations have been in agreement that they will cease all flights and take other agreed upon economic measures against any country which does not extradite or prosecute terrorists or return hijacked aircraft.

E. Bilateral Agreements. Bilateral agreements such as the Supplementary Extradition Treaty entered into between the United Kingdom and the

United States on 25 June 1985, hold promise as well. This agreement excludes specified offenses typically committed by terrorists from the political offense exception in their 1972 Extradition Treaty. It is clear that a combination of bilateral and multilateral agreements, coupled with an effective domestic legal regime, is required if nations are to effectively reduce acts of international violence and hold the perpetrators accountable.

2407 LEGAL RESPONSE TO STATES SPONSORING TERRORISM. State-sponsored terrorism is a strategy that does not follow traditional military patterns. In fact, one fundamental characteristic is its violation of established legal norms. International law requires that belligerent forces, including irregulars, identify themselves, carry arms openly, and observe the laws of armed conflict. Principal among those laws are the principles of necessity of action, proportionality of response, and target discrimination. Military necessity is the principle which justifies a measure of regulated force not forbidden by international law to eliminate an imminent military threat. Discrimination is an aspect of targeting which requires that the objects of attack bear a military relationship to the participant state. Under the law of armed conflict, only military installations and personnel (or their agents in the case of state-sponsored terrorism) may properly be targeted for destruction. This last principle confirms the basic immunity of the civilian population during armed conflict at whatever level.

A. Differing Perspectives. Terrorists and their state-sponsors purposefully blur the distinction between civilians and members of the armed forces in the target state. When a state-sponsored terrorist attack occurs, a number of legal and policy considerations arise. Foremost is an understanding that certain states' ideological views of the weight to be accorded international law may differ from the Western perspective. In the Middle East, for example, the military imbalance between the United States and states with interests at variance with the United States can result in perceived justification for extra-legal measures. The Soviet Union and its surrogates, conversely, choose to characterize the law, as do all states to a varying degree, in their own national interest. Analysis of Soviet decision-making reveals that identical principles of international law applied by Western and Socialist states cannot be placed in parallel columns and compared by their terminology alone. The purpose of Soviet law is determinative of its characterization. The Soviets do not consider a commitment to non-interference in the internal affairs of sovereign states to be inconsistent with promoting class struggle in those same countries, or with supporting national liberation movements in Asia, Africa, and Latin America. For this reason, national leaders must ensure those international law commitments clarified in the U.N. Charter are not subject to loose interpretation by any state.

B. Article 2 of the U.N. Charter. The basic provision restricting the threat or use of force in international relations is Article 2, Paragraph 4, of the United Nations Charter. That provision states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in a manner inconsistent with the purposes of the United Nations."

1. Purpose. The underlying purpose of Article 2, Paragraph 4, to regulate aggressive behaviors between states, is identical to that of its precursor in the Covenant of the League of Nations. Article 12 of the Covenant stated that League members were obligated not "to resort to war." This terminology, however, left unmentioned hostilities which, although violent, could not be considered war.

2. Wordsmithing. The drafters of the U.N. Charter wished to ensure that the legal niceties of a conflict's status did not preclude cognizance by the international body. Thus, in drafting Article 2, Paragraph 4, the term "war" was replaced by the phrase "threat or use of force." The wording has been interpreted as prohibiting a broad range of hostile activities including not only "war" and other equally destructive conflicts, but also applications of force of a lesser intensity or magnitude.

3. Application. The actions of states supporting terrorist activities clearly fall within the scope of Article 2, Paragraph 4. The illegality of aid to terrorist groups has been well established by the U.N. General Assembly in Resolutions 2625 and 3314. These Resolutions prohibit the "organizing," "assisting," or "financing" of "armed bands" or "terrorists" for the purpose of aggression against another state.

C. Self-Defense. The right of self-defense is codified in Article 51 of the United Nations Charter. That article provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations. . . ." The use of the word "inherent" in the text assures that the right of self-defense is broader than merely providing a right to respond to a devastating armed attack which has already been absorbed. Article 51, like Article 2(4), has its roots in customary international law. Customary international law embraces a comprehensive conception of permissible or defensive coercion, honoring appropriate response to threats of an imminent nature. It is precisely this anticipatory element of lawful self-defense that is critical to an effective policy to counter an imminent threat of state-sponsored terrorism. Governmental response to state-supported terror violence, where the elements of necessity and proportionality are met, is clearly supported by customary international law and the U.N. Charter.

2408 **UNITED STATES POLICY.** U.S. policy on terrorism is clear: All terrorist acts are criminal. The U.S. Government will make no concessions to terrorists. Ransom will not be paid, and nations fostering terrorism will be identified and isolated. Defensive measures taken to combat terrorism are referred to as antiterrorism and are used by DoD to reduce the vulnerability of DoD personnel, their dependents, facilities and equipment to terrorist acts. Counterterrorism, meanwhile, refers to offensive measures taken to respond to a terrorist act, including the gathering of information and threat analysis in support of those measures. Since a consistent objective of terrorists is to achieve maximum publicity, a principal objective of the U.S. Government is to thwart the efforts of terrorists to gain favorable public attention and, in doing so, to clearly identify all terrorist acts as criminal and totally without justification for public support. Further, when U.S. military personnel are identified as victims of terrorism, it is DoD policy to limit release of information concerning the victim, his or her biography, photographs, lists of family members or family friends, or anything else which might create a problem for the victim while in captivity. Withholding such information, which will be made public at a later date, may well be the action that saves the victim from additional abuse or even death. It is a case where protection of the potential victims, operational security considerations, and counterterrorism efforts override standard public affairs procedures.

2409 **AGENCY RESPONSIBILITIES**

A. General. In responding to terrorist incidents, the lead agency in the Department of Defense is the Department of the Army. Within the United States, the Department of Justice (FBI) is assigned the role of lead agency for the Federal Government -- with the exception of acts that threaten the safety of persons aboard aircraft in flight, which are the responsibility of the Federal Aviation Administration.

B. Outside Military Installations in the U.S. The use of DoD equipment and personnel to respond to terrorist acts outside military installations is governed generally by the legal restrictions of the Posse Comitatus Act. The direct involvement of military personnel in support of disaster relief operations or explosive ordnance disposal is permissible. Moreover, the loan of military equipment, including arms and ammunition, to civilian law-enforcement officials responding to terrorist acts viewed as a form of civil disturbance is also considered permissible, subject to the approval of proper military authority. Under the Memorandum of Understanding (MOU) Between Department of Defense, Department of Justice and the Federal Bureau of Investigation concerning the use of Federal military forces in domestic terrorist incidents, the use of DoD personnel to respond to terrorist acts outside military installations in the United States is authorized only when directed by the President of the United States. One organization available for such action is the

Counter Terrorism Joint Task Force, composed of selected units from all of the armed forces.

C. On Military Installations in the U.S. When terrorist activities occur on a military installation within the United States, its territories and possessions, the FBI's Senior Agent in Charge (SAC) for the appropriate region must be promptly notified of the incident. The SAC will exercise jurisdiction if the Attorney General or his designee determines that such an incident is a matter of significant Federal interest. Military assistance in such an event may be requested without Presidential approval, but such assistance must be provided in a manner consistent with the provisions of the MOU, including the requirement that military personnel remain under military command. If the FBI declines to exercise its jurisdiction, the military commander must take appropriate action to protect and maintain security of his command as required by articles 0802, 0809 and 0826 of U.S. Navy Regulations, 1990. Regardless of whether or not the FBI assumes jurisdiction, the base commander may take such immediate action in response to a fast-breaking terrorist incident (such as utilizing a Crisis Response Force (OPNAVINST 5530.14 series)) as may be necessary to protect life or property.

D. Outside the U.S. Outside the United States, its territories and possessions, where U.S. military installations are located, the host country has the overall responsibility for combatting and investigating terrorism. Within the U.S. Government, the Department of State has the primary responsibility for dealing with terrorism involving Americans abroad and for handling foreign relations aspects of domestic terrorist incidents. The planning, coordination, and implementation of precautionary measures to protect against, and respond to, terrorist acts on U.S. military installations remains a local command responsibility. Contingency plans will necessarily have to address the use of installation security forces, other military forces, and host nation resources and must be coordinated with both host country and State Department officials. Outside U.S. military installations located in a foreign country, U.S. military assistance, if any, may be rendered only in accordance with the applicable SOFA after coordination with State Department officials.

2410 **JUDGE ADVOCATE'S ROLE.** The SJA may get involved in the proactive phase of reviewing contingency plans. For example, each command -- under physical security regulations -- is required to publish an instruction dealing with hostage situation procedures. Second, when a potential terrorist incident arises, the judge advocate may become involved in the reactive phase by providing advice on issues (such as when the FBI must be called in) or "negotiating" with the terrorists or civil law-enforcement authorities in the U.S., or the State Department and host country representatives abroad. See Bowman, "The Military Role in Meeting the Threat of Domestic Terrorism," 39 Naval L. Rev. 209 (1990).

CHAPTER 25

PERSONNEL AND INFORMATION SECURITY

2501 REFERENCES

- A. OPNAVINST 5510.1H
- B. NCPCINST 5521.1
- C. SECNAVINST 5510.30
- D. OPNAVINST 5529.1
- E. DoD Directive 5525.7 of 22 January 1985

2502 **SECURITY CLEARANCES.** A security clearance is a determination of eligibility for access to classified information. The clearance is an affirmation that an individual's reliability, honesty, loyalty, judgment, and trustworthiness are such that allowing access to classified material is clearly consistent with the issues of national security. Once clearance has been granted, eligibility is retained until there is reason to remove it. Any doubt is resolved in favor of the national security.

A. **Eligibility.** Eligibility for clearance is based on all available information, favorable and unfavorable, about the individual. Sources of information include the application, security forms, personnel, medical, law enforcement or legal files, and investigative reports. This information is provided to an adjudicator, who decides whether clearance is appropriate for a given individual. The framework in which the adjudicator operates is built on security criteria—factors identified as having significance in security determinations. Some of the criteria apply directly to the person's loyalty to the U.S. Others deal with questions of character and conduct. The general criteria are contained in OPNAVINST 5510.1H.

B. **Disqualifying Behavior.** Common disqualifying behavior includes desire for money, alcohol or drug abuse, sexual misconduct, and/or disregard for laws/regulations. The kinds of disqualifying conduct described in the adjudication criteria are often what hostile intelligence services look for in targeting and recruiting individuals for use against the United States.

C. Denial/Revocation of a Servicemember's Clearance.

The commanding officer decides whether to deny or revoke a member's security clearance, and whether to reassign a servicemember whose clearance has been revoked. The person concerned will be given a written statement of the reason for revocation or denial, an opportunity to reply in writing, a written response to any input, and an opportunity to appeal to the Naval Military Personnel Command.

D. Centralization of Navy Military Security Clearances.

The Department of the Navy Central Adjudication Facility (DON CAF) began central processing of all active duty and reserve Navy military personnel security clearances on 1 July 1989. Several changes have flowed from this modification of the previous practice of local command security clearance processing. Navy military personnel no longer report to a gaining command in possession of a security clearance. Eligibility for clearance remains unchanged, however, and clearance may be reestablished upon request to DON CAF by the member's new command. Commanding officers of intermediate and ultimate duty stations may grant interim clearance contemporaneous with a request to DON CAF to grant the required final security clearance. Commanding officers retain authority and responsibility for controlling individual access to classified information. On detachment, DON CAF will administratively withdraw the member's clearance. Security questions should be addressed to Code 11 as the Naval Legal Service Command security manager.

2503 **CIVIL SERVICE EMPLOYEE SECURITY CLEARANCES.**

The basic authority for the Federal Civilian Personnel Security Program is Executive Order 10450 which requires that investigations be conducted on all persons entering the federal civilian service. An additional personnel security investigation is required before a person will be granted a clearance. The various types of investigations are described in OPNAVINST 5510.1H. Appointment of a civilian employee is subject to investigation. NCPCINST 5521.1. The type of investigation conducted depends on whether the position is critical-sensitive, noncritical sensitive, or nonsensitive.

A. Emergency Appointments. An employee cannot be appointed to a sensitive position until a background investigation is completed, except in an emergency, where, in the commanding officer's determination, a delay in appointment would be harmful to the national security. Guidance on when emergency appointments are appropriate can be obtained from CNO (OP-009P). OPNAVINST 5510.1H.

B. Denial/Revocation of Clearance of a Civilian Employee. If a civilian does not meet the criteria for a security clearance, his clearance will be denied or revoked by the Director, Naval Civilian Personnel Command (NCPC). OPNAVINST 5510.1H. The commanding officer does not have the power to revoke a civilian employee's

security clearance. The commander does have the power, however, to restrict or suspend that employee's access to classified information. Restriction or suspension of access may only be used as a temporary measure until the individual's eligibility for access has been resolved by NCPC. A civilian employee has detailed appeal rights if his security clearance is denied or revoked.

C. Loss of Employment When Security Clearance Revoked. An employee who has a permanent appointment and has completed a probationary period cannot be removed from employment solely because his security clearance has been revoked. Civ. Pers. Reg. No. 752-1, Subch. 53(b)(8)(23 July 76). If possession of a security clearance is a requirement of the position which the employee fills, however, the employee may be removed following clearance revocation for failure to meet this position requirement.

1. If an employee has a job that requires a security clearance, and loses that clearance, the Navy must exercise due diligence before removal to place that employee in a job that does not require a security clearance within the same command. An employee should not be removed from employment for security related reasons if effective action can be taken under nonsecurity regulations. OPNAVINST 5510.1H; SECNAVINST 5510.30, para. 4c.

2. An employee against whom removal action is proposed has statutory response rights under 5 U.S.C. § 7513(d), including notice, a right to respond, and the right to an attorney. If the employee is removed after this appeal procedure has been followed, then the employee concerned has a statutory right to appeal that action to the Merit Systems Protection Board (MSPB) within twenty days following the effective date of the action. 5 C.F.R. § 1201.22.

3. In Department of the Navy v. Egan, 484 U.S. 518 (1988), the Supreme Court held that the MSPB has no authority to review an executive branch decision to revoke a security clearance. The Board will review the agency's procedures, however, to ensure the appellant was afforded procedural due process. Minimal due process consists of notice of the denial or revocation, a statement of the reason(s) upon which the negative decision was based, and an opportunity to respond. In Dorfmont v. Brown, 913 F.2d 1399 (9th Cir. 1990), the Ninth Circuit concluded that the logic of Egan precluded judicial review of the clearance revocation as well. The court also dismissed Dorfmont's procedural due process challenge, confirming that employees have no property or liberty interest in the possession of a security clearance.

4. Faced with the brick wall of Egan, some employees have attacked the denial or revocation of their security clearances, and consequent loss of employment, on an employment discrimination theory. Thus far, the Equal

Employment Opportunity Commission (EEOC) has read the Egan decision narrowly. The EEOC held that Egan did not preclude it from determining whether a grant, denial, or revocation of a security clearance was conducted in a discriminatory manner in violation of Title VII. Having reached this conclusion, however, the EEOC then took a narrow view of what it can review: As long as an agency applies the requirement of a security clearance "to both those employees in petitioner's class and those outside his class, petitioner has failed to state a claim of discrimination over which the Commission has jurisdiction." Guillot v. Garrett, Petition No. 03890008, MSPB No. DC07528810021 (5 January 1990)(Navy withdrawal of SCI access upheld; petitioner, a recovering alcoholic and drug addict, was not a handicapped person within the meaning of the Rehabilitation Act). Hahn v. Marsh, EEOC No. 01890734, 891109 FEOR (May 11, 1989) presented an allegation of unlawful employment discrimination on the basis of national origin in violation of Title VII. Hahn, a Korean-born U.S. citizen, was told he was not selected for an Army GS-12 General Engineer position because he might have had relatives still living in North Korea or Vietnam and therefore the security guidelines prevented him from being accessed to the program in question. Some evidence in the record suggests the Army may have decided that a full clearance investigation would have been too difficult to complete in Hahn's case. The Army argued that Egan precluded review. The EEOC distinguished Egan as involving only the narrow question of the MSPB's statutory authority, not employment discrimination. Hahn had not challenged the merits of an agency decision to deny him a security clearance, but instead had alleged that the agency discriminated against him on the basis of national origin when he was not selected. The EEOC concluded that the Army improperly rejected Hahn's complaint and remanded the case for further processing under EEO regulations, without taking a position on the merits. It remains to be decided whether an agency's decision to forego a security investigation for reasons of impracticability is within the bounds of discretion outlined in Egan and its progeny.

2504 SENSITIVE COMPARTMENTED INFORMATION (SCI).
SCI is classified information concerning or derived from intelligence sources, methods, or analytical processes that is required to be handled exclusively within formal access control systems established by the Director of Central Intelligence. SCI includes all information and materials requiring special intelligence community controls indicating restricted handling within present and future community intelligence collection programs and their end products. These special community controls are formal systems of restricted access established to protect the sensitive aspect of sources, methods and analytical procedures for foreign intelligence programs. Communications intelligence, as defined by 18 U.S.C. § 798, is an example of SCI, and is normally derived from intercepted communications.

A. Authority. The authority for SCI control systems is based upon the statutory responsibility of the Director of Central Intelligence (DCI), under the National Security Act of 1947, for the protection of intelligence sources and methods, and upon Executive Order 12356, which authorizes the DCI to create special access programs for especially sensitive intelligence activities.

B. Special Protection. The compromise of technical collection systems, or the information derived from them, can tell potential adversaries the capabilities of our systems and how to take effective countermeasures. Worse, once the target country's government knows what the systems collect and how it is collected, it has the option of conducting deception operations, i.e., providing misleading data which may result in dangerously defective U.S. foreign and defense policies.

C. Other Clearances Distinguished. Persons cleared for confidential, secret, or top secret information are not automatically eligible by virtue of those clearances for access to SCI. Conversely, the denial of SCI approval does not necessarily mean denial or revocation of top secret clearance. SCI simply involves a more sensitive aspect of security than non-SCI security.

D. SCI Eligibility. The personnel security criteria for access to SCI are established by the Director of Central Intelligence in Director of Central Intelligence Directive (DCID) 1/14. Paragraph 15 of DCID 1/14 provides that "[a]ny doubt concerning personnel having access to SCI shall be resolved in favor of the national security." A determination to grant SCI eligibility will be made by either the Commander, Naval Intelligence Command or the Commander, Naval Security Group Command or their Deputies, as appropriate, following an investigation conducted by the Defense Investigative Service. OPNAVINST 5510.1H. Two Determination Authorities appointed respectively by COMNAVINTCOM and COMNAVSECGRU, will make all decisions to deny or revoke SCI access eligibility. OPNAVINST 5529.1, para. 5a.

E. Obtain SCI Access and Appeal Rights. A special background investigation must be completed by the Defense Investigative Service before SCI will be granted. In recent years, obtaining SCI access has taken from three to thirteen months. The specific appeal procedures for denial or revocation of SCI access have been prescribed by the COMNAVINTCOM and COMNAVSECGRU per OPNAVINST 5529.1. Paragraph 6 of OPNAVINST 5529.1 and Annex B to DCID 1/14 describe the basic appeal rights for a person whose access to SCI has been denied or revoked. That person is entitled to notice of the denial or revocation, and the procedures by which the reasons for such denial or revocation may be obtained. Such person also has the right to supplement the record and submit a written appeal to the designated Appellate Authority. A second appeal may be made to COMNAVINTCOM or COMNAVSECGRU, as appropriate, the Navy SCI Final Appeal Authorities.

2505 **CONTROL OF CLASSIFIED MATERIAL.** Detailed rules on the safeguarding of classified information are contained in Chapter 13 of OPNAVINST 5510.1H.

A. **Mailing.** Generally, secret material may be sent by registered mail. Confidential material can be sent certified or first class mail within the U.S. and its territories. When classified material is mailed, it must be enclosed in two envelopes. The outer envelope will not bear evidence of its classified contents. Top secret material and SCI may not be transmitted by mail.

B. **Handcarrying.** Handcarrying classified material outside of the command must be approved by the commanding officer or by his designee. The security manager must be advised when anyone in a travel status needs to handcarry classified material to or from the command. The security manager will then advise the traveler on the appropriate precautions described in Chapter 16 of OPNAVINST 5510.1H. Classified material may not be read or displayed on a public conveyance.

2506 **COMPROMISE.** Compromise is defined as a security violation which has resulted in confirmed or suspected exposure of classified information or material to an unauthorized person.

A. **Investigation.** An inquiry and/or investigation is required by OPNAVINST 5510.1H, Chapter 4, whenever classified material is subject to compromise. A preliminary inquiry shall be conducted in every confirmed or suspected case of compromise. The preliminary inquiry is forwarded to the next senior in the chain of command if it is determined that: (1) there is minimal risk to the national security; (2) no significant activity security weakness is found; and (3), punitive action is inappropriate. If any of those criteria are not met, a JAG Manual investigation shall be conducted. Serious cases shall be referred to NIS in addition to conducting the JAG Manual investigation.

B. **Reporting Requirements.** The rules concerning protection of classified information in chapters 4 and 5 of OPNAVINST 5510.1H include:

1. Any person who learns that classified material has been compromised or has been subject to compromise must notify "the most readily available command."
2. The custodian of classified material who becomes aware of actual or possible compromise, must report that fact to his superior officer immediately.

3. Any person who becomes aware that classified information may have been compromised as a result of disclosure in the public media has an obligation to notify the cognizant sponsor of the information, or CNO (OP-009P), if the sponsor is unknown.
4. Individuals becoming aware of possible acts of espionage, sabotage, or other subversive activities should immediately notify their commanding officer, who will notify the local NIS office. SECNAVINST 5520.3. If the local NIS office cannot be notified immediately and the case involves a serious security threat to classified information through espionage or the immediate flight or defection of an individual, a classified PRIORITY message should be sent to the Director, NIS with an info copy to CNO (OP-009P).
5. Any form of contact with any citizen of a communist controlled country shall be reported to NIS. Contact encompasses any form of encounter, e.g., by radio, telephone, letter, etc.
6. Any suicide or attempted suicide by a person who has had access to classified information should be reported to the nearest NIS office and the Director, NIS.
7. A commanding officer should conduct an inquiry concerning any unauthorized absentees who had access to classified information. If the result of inquiry indicates national security concerns, the incident should be referred to the local NIS office.
8. If a classified material container is found unlocked and unattended, the senior duty officer is to be notified, who will take further action and notify the commanding officer.

C. Espionage Investigations. Section 603 of the FY 90 Intelligence Authorization Act addressed FBI investigations of espionage by persons employed by or assigned to United States diplomatic missions abroad. Pub. L. 101-193, 103 Stat. 1710. Section 603 provides: "Subject to the authority of the Attorney General, the FBI shall supervise the conduct of all investigations of violations of the espionage laws of the United States by persons employed by or assigned to United States diplomatic missions abroad. All departments and agencies shall report immediately to the FBI any information concerning such a violation. All departments and agencies shall provide appropriate assistance to the FBI in the conduct of such investigations. Nothing in this provision shall be construed as establishing a defense to any criminal, civil, or administrative action."

2507

NATIONAL SECURITY CASES

A. Defined. JAG Manual § 0159 defines "national security" to mean the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a military or defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert. That section provides an illustrative laundry list of examples of national security cases, including: deliberate compromise or willful disclosure of classified information; aiding the enemy; spying or espionage; harboring or concealing certain persons; gathering, transmitting, or losing defense information; sabotage; treason, rebellion, insurrection, or sedition; disclosing restricted data; conspiracy to commit any of the above offenses; violating an order with regard to any of the above activities; and soliciting another to commit any of the above offenses.

B. Jurisdiction. Military authorities and federal civil authorities have concurrent jurisdiction over offenses committed by military personnel which are service-connected and violate both federal criminal law and the UCMJ. Offenses involving national security issues commonly involve federal criminal law. JAG Manual § 0125 contains guidelines on which authority, military or civilian, has jurisdiction to investigate and prosecute particular cases. NIS is responsible for coordination with federal civil authorities on such investigations. Every incident which appears to involve espionage, subversion, aiding the enemy, sabotage, spying, or the knowing and willful compromise of classified information must be referred immediately to NIS. NIS will then notify OJAG, who will consult the Department of Justice. The procedure for delivering military offenders to civilian authorities is discussed in MCM, 1984, R.C.M. 106 and in the JAG Manual, chapter VI. DoJ gets first crack at prosecuting national security cases. OJAG, Code 11 (Special Programs), monitors all national security investigations and briefs DoJ when a prosecution decision must be made. If DoJ declines the case, we may then prosecute.

C. Convening Authority Limitations. Under R.C.M. 306(a) and 401(a), MCM, 1984, SECNAV has withheld authority to dispose of national security cases. Per JAG Manual § 0126b, Navy GCMA's are: CNO; CINCLANTFLT; CINCPACFLT; CINCUSNAVEUR; Commanders, Sixth and Seventh Fleets and Eastern Atlantic; Commanders, Naval Air, Submarine, and Surface Forces, U.S. Atlantic and Pacific Fleets; and CNET. For the Marine Corps, the authorized GCMA's for national security cases are: CMC, FMFPAC, FMFLANT, MCCDC, and CG, MCBs Lejeune, Butler, and Pendleton. All officers otherwise empowered to dispose of offenses who receive reports or charges of offenses involving national security shall, after notifying NIS, forward reports or charges for disposition directly and without delay to an

authorized GCMA. In time of war, Article 43(e), UCMJ, authorizes SECNAV to extend the statute of limitations to six months after the termination of hostilities where prosecution is inimical to the national security.

D. Referral. Offenses against national security generally involve incidents which have the potential for serious and irreparable damage to the United States. Consequently, these cases are typically referred to trial by general court-martial if referral of charges is warranted at all. The prosecution of charges involving national security matters may in some circumstances be inimical to the prosecution of war or harmful to national security interests. The GCMA should, after weighing national security considerations, dismiss the charges, authorize a court-martial, or forward the charges to SECNAV pursuant to MCM, 1984, R.C.M. 407(b) and OPNAVINST 5510.1H. M.R.E. 505 gives the convening authority options when a claim of privilege from disclosure of classified information has been made by the head of the government agency or department concerned. These options include dismissal of the charges or specifications to which the classified information pertains and limited disclosure of the classified material in accordance with M.R.E. 505(g). The matter can be taken before the military judge for an in camera proceeding. M.R.E. 505(g).

E. Grants of Immunity. A proposed grant of immunity in cases involving espionage, subversion, aiding the enemy, sabotage, spying, or violation of regulations concerning classified information or U.S. foreign relations must be forwarded to the DoD General Counsel for consultation with the Department of Justice. Judge Advocate General approval can be obtained by the cognizant officer exercising general court-martial jurisdiction by forwarding a request to the Judge Advocate General (Code 20) in the form prescribed by the JAG Manual, §§ 0138d, 0139. This procedure is required by a 1984 MoU between DoJ and DoD. DoD Directive 5525.7 of 22 January 1985; SECNAVINST 5520.3.

F. Improper Promises of Immunity to Obtain Information on Classified Information Leaks. In cases where it is suspected that national security information has been leaked, there may be a temptation to make promises of immunity to a suspect in order to determine the extent of information leaked. This should be avoided. In Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982), a writ of mandamus directing the trial judge to dismiss all charges was issued after the court ruled that a violation of constitutional due process had occurred when the Staff Judge Advocate concerned acted improperly regarding immunity promises. 12 M.J. 338-343. In other cases, unkept immunity promises may lead to suppression of a confession at a subsequent court-martial. 12 M.J. 345 and 371.

G. Discovery. M.R.E. 505 and R.C.M. 701(f) protect classified information from disclosure when disclosure would be detrimental to national security. If the classified material is relevant and necessary to establish an element of an offense or

a defense, generally there must be full or limited disclosure of the classified material, or the charges and specifications pertaining to that material may be dismissed with or without prejudice. M.R.E. 505(i)(4)(E). The privilege not to disclose classified Navy information under M.R.E. 505(c) may be claimed only by SECNAV. Consequently, early submission of a request for assertion of the privilege is desirable. Coordinate with the OJAG (Code 20).

H. Pretrial Agreements. JAG Manual § 0137c states that no DoN official is authorized to enter into a pretrial agreement in any national security case without first obtaining SECNAV permission. If the accused or defense counsel offers to plead guilty, the authorized GCMA may enter into pretrial agreement discussions. These cases typically contain detailed provisions for counterintelligence debriefing of the accused and polygraph confirmation of truthfulness. If discussions result in terms which are mutually agreeable to the convening authority and the accused, the convening authority shall request SECNAV permission to enter into a written pretrial agreement embodying those terms by priority message with information copies to JAG and CNO or CMC.

1. SJA's, TC's, and DC's should recognize that additional time and effort will be required to reach agreements in national security cases. Effective coordination among interested parties is critical, especially when the accused is in pretrial confinement, witnesses are geographically distant, or other conditions complicate and frustrate speedy disposition. SECNAV will scrutinize such agreements to ensure that they satisfy broad national security interests. Critical factors therefore can include strength of the Government's case; consistency with sentences in similar cases, both military and civilian; applicable range of sentences for comparable Federal offenses under the Federal Sentencing Guidelines, 18 U.S.C. App.; counterintelligence benefits of leveraged debriefing; need for consultation with other agencies; notoriety and deterrent effect; accused's venality and nature and degree of the trust violated; effect of conviction on accused's entitlement to public office and/or retirement (e.g., 5 U.S.C. § 8312 or 18 U.S.C. §§ 201(b), 2071 (b)); damage to the national security, effected or intended; undesirable risks of classified disclosures during contested trial now to be obviated; avoided appellate issues; and, of course, extenuating or mitigating circumstances.

2. If a tentative agreement is reached, the GCMA shall request SECNAV permission by priority message, with info copies to CNO or CMC, and JAG. The message will state: the exact text of the proposed agreement; the factual background of the offense(s); information pertaining to the accused's identity; a summary of the Government's evidence on the merits and in sentencing; and a summary of the factors warranting acceptance of the agreement.

3. All concerned should also beware of the possible effect of M.R.E. 410 and should decline to receive evidence or statements of the accused in the plea negotiation process if to do so could create an unintended use immunity. Code 11 can provide both administrative and substantive support in national Security or other classified cases for negotiation and drafting of pretrial agreements. Contact Code 11 immediately if a pretrial agreement is contemplated or if the convening authority has entered into pretrial negotiations.

I. Closed Trial or Pretrial Investigation

1. Pretrial Investigation. R.C.M. 405(h)(3) permits the pretrial investigation to be closed to the public in whole or in part at the discretion of the IO or appointing authority. This provision is broad enough to allow closure when classified material will be introduced.

2. Court-Martial. M.R.E. 505(j)(5) permits a closed court-martial session when classified material is introduced, and specifies the procedure to follow. OPNAVINST 5510.1H establishes additional procedures. JAG Manual § 0144; R.C.M. 806. United States v. Grunden, 2 M.J. 116 (C.M.A. 1977)(Pre-M.R.E. decision providing guidance on exclusion of the public from trial where matters affecting national security were to be presented).

J. Posttrial Considerations. M.R.E. 1104(b)(1)(D) and OPNAVINST 5510.1H prescribe procedures to be followed when the record of trial contains classified information. Per JAG Manual § 0159, only SECNAV may remit or suspend, pursuant to Article 74(a), UCMJ, any part or amount of the approved sentence in any case involving national security.

2508 **PRODUCTION OF CLASSIFIED INFORMATION IN CIVILIAN COURTS.** Whenever a subpoena issued by a federal or state court of record calls for production of classified information, the subpoena shall immediately be referred to OJAG (Code 015), who will coordinate the response with CNO (OP-009P). JAG Manual, Chapter VI. OPNAVINST 5510.1H outlines special procedures if classified documents are to be introduced in a civil court. Classified material will not be authorized for introduction into a civil trial before a jury. The Classified Information Procedure Act, Pub. L. 96-456, 18 U.S.C. App., governs the use of classified information in federal courts for criminal cases. A survey will not be permitted of a naval ship following a collision if the survey would require access to classified information. OPNAVINST 5510.1H.

2509 PUBLICATION OF NATIONAL DEFENSE INFORMATION
BY THE MEDIA

A. Injunctions. If the Government learns that sensitive national defense information is about to be published, it can seek to enjoin publication. The injunction may be sought on constitutional or statutory authority, depending on the circumstances of the case. An injunction is expressly authorized, for example, by 42 U.S.C. § 2280 for threatened publication of "restricted data," which is defined in 42 U.S.C. § 2014(y). United States v. Progressive, 467 F.Supp. 990 (D.C. Wisc.), appeal dismissed, 610 F.2d 819 (7th Cir. 1979), reconsideration denied, 486 F.Supp. 5. (Gov't enjoined publication of an article describing the method of manufacturing and assembling a hydrogen bomb); Snepp v. United States, 444 U.S. 507 (1980) (Court enjoined further publication of a book by a former CIA employee for failure to comply with prepublication review agreement); New York Times Co. v. United States, 403 U.S. 713 (1971) (Gov't denied an injunction against publication of the so-called Pentagon Papers for its failure to demonstrate a "direct, immediate, and irreparable damage to our Nation or its people"). Even when a legal basis to support an injunction exists, policy considerations may make it undesirable. By seeking an injunction, the Government may implicitly confirm the accuracy of any information which has been disclosed. Further, litigation attracts greater attention to the information the Government seeks to suppress.

B. Demand for Return of the Secret Documents. The Espionage Act, 18 U.S.C. § 793, appears to give the U.S. the right to demand the return of certain national defense information. When return of national defense information is sought, it is advisable in most cases to first contact the JAG Special Programs Office (Code 015). Threatened or attempted prosecution for refusal to return national security information which was lawfully obtained may fall to first amendment considerations. There is argument that if publication of national defense information is protected from prior restraint by the first amendment unless publication would result in direct, immediate, and irreparable damage to the U.S. or its people, then retention of documents preparatory to such publication must also be so protected. If no first amendment considerations exist, refusal to return national defense material is undeniably a criminal offense even if the material was acquired legally. AST/Serve Systems v. United States, 449 F.2d 789 (Ct. Cl. 1971).

C. Criminal Prosecution. Different first amendment standards apply to prosecution of someone who publishes national defense information than to an attempt to impose a prior restraint on publication. Criminal prosecution may be successful in the same case in which an injunction was denied. Statutes imposing criminal penalties for publication of national defense information include: 18 U.S.C. § 952 [diplomatic codes]; 42 U.S.C. § 2274(b) [nuclear weapons data]; 18 U.S.C. § 798

[cryptographic information]; and 18 U.S.C. § 797 [photographs or graphic representations of any vital military installations, equipment or documents].

2510 **PROCEDURES FOR PREDISCLOSURE REVIEW.** All classified information and certain unclassified official information must be reviewed by appropriate authority before it can be disseminated outside official channels.

A. **Classified Information.** In general, classified material originating within DoD, cannot be disseminated outside DoD without the consent of the originator or higher authority. The sole exception permits the dissemination of secret and confidential material to other Executive departments and agencies unless specifically prohibited by the originator.

B. **Unclassified Information.** Naval personnel, including members of the Ready and Standby Reserve, may not engage in informative activities (including speaking, writing, appearances, and lectures), with or without compensation, that are dependent upon information obtained as a result of their Government employment except when the information has been published or is generally available to the public, or will be made generally available to the public and the official authorized to release such information gives written authorization for the use of nonpublic information on the basis that its use is in the public interest. SECNAVINST 5370.2J.

C. **Release Authority.** In addition, certain categories of unclassified information require review and clearance before public release. The information must be submitted to the Office of the Assistant Secretary of Defense (Public Affairs) via the Chief of Naval Operations (OP-009P). These categories of information are contained in OPNAVINST 5510.1H and SECNAVINST 5720.44A. They include information which has the potential to become an item of national or international interest, information which concerns high level military, DoD, or U.S. Government policy, information which concerns military operations or potential operations, and other categories designated by the Office of the Secretary of Defense. Both speeches and writings are subject to review. In addition, DoD members who are students and who prepare manuscripts for publication in an unofficial capacity, must submit their manuscript for DoD review prior to submission for publication.

D. **Cognizant Reviewing Authorities.** Material which contains the following subject matter, or which may have derived from access to the following subject matter, must be reviewed by the following authorities:

1. Single Integrated Operational Plan-Extremely Sensitive Information (SIOP-ESI): OP-65.

2. Naval Nuclear Propulsion information: OP-009P.
3. Proposed release of intelligence, as defined in OPNAVINST 5510.1H, or of information contained in special access programs: Director of Naval Intelligence.
4. Cryptographic, cryptologic, and COMSEC information: Commander, Naval Security Group.
5. CIA information: CIA, via Commander, Naval Intelligence Command (NIC-52).
6. Legislative recommendations by any DoD department or agency: SECNAV.
7. International arms traffic: OP-62.
8. Information originating from a non-DOD department or agency: the originating department or agency.
9. Proposed procurement contracts in excess of \$1 million: CHINFO 4280-I.
10. Photographs: the commanding officer with jurisdiction over the subject matter of the photograph.

E. Review Provisions of Nondisclosure Agreements. The Government provides access to SCI only when the individual agrees to sign a nondisclosure agreement (NDA). The NDA provides, among other things, that the individual will not disclose SCI information without prior written approval. Individuals must submit for review all information they propose to disclose for a determination as to whether it contains such information. Each signed NDA is retained for 70 years or until the death of the signer. On 11 March 1983, the President issued National Security Decision Directive (NSDD) 84 which requires all persons authorized access to classified information to sign a nondisclosure agreement as a condition of access. The Supreme Court has ruled that NDAs are lawful and enforceable, at least where the CIA is concerned. Snepp v. United States, 444 U.S. 507 (1979). The remedy afforded by the court was an injunction against further publication of the material and a constructive trust in favor of the Government on profits generated by the unauthorized publication. Recent suits brought by the American Federation of Government Employees (AFGE), the National Federation of Federal Employees (NFFE), and others have challenged SF-189 and SF-4193 NDAs on the dual grounds that their continuing use violated section 630 of the Omnibus Continuing Resolution

for Fiscal Year 1988 and that they contained unconstitutionally vague and overbroad language. Section 630 prohibited expenditure of funds for implementation or enforcement of these NDAs. The NFFE suits focus in large part on the definitions of the terms "classified information" and "classifiable" as contained in the NDAs. SJAs faced with these issues should contact OJAG for late-breaking guidance.

F. Publication of Classified Information by Defense Contract Employees. In general, defense contractors agree by contract to protect classified information, but their employees do not (unless the employee has access to SCI). If an employee of a defense contractor releases or threatens to release classified information, the standard for an injunction would be the Pentagon Papers Case. Obtaining an injunction is difficult. For prosecution, specific intent would have to be shown under, e.g., 18 U.S.C. § 793, of the Espionage Act. For threatened release of information, both the contractor and his employee should be counseled and the employee's security clearance should be reevaluated. The employee should be asked to sign an acknowledgement that he has been advised that he should no longer disseminate classified information, and that he has been presented with the particular regulations.

CHAPTER 26

SPECIAL INCIDENT REPORTING

2601 REFERENCES

- A. OPNAVINST 3100.6E SPECIAL INCIDENT REPORTING
- B. NWP-4A BASIC OPERATIONAL COMMUNICATIONS DOCTRINE
- C. DIAM 58-2, VOL II, PART 9 DEFENSE INTELLIGENCE COLLECTION REQUIREMENTS MANUAL - REQUIREMENTS REPORTING/GUIDANCE PROGRAMS
- D. OPNAVINST 5102.1B

2602 **INTRODUCTION.** The Navy makes use of several reporting systems to provide the National Command Authority (NCA) with timely, concise information on which to base an appropriate response to any significant incident. The systems used primarily by the Navy are the OPREP-3, the UNIT SITREP, and the CRITIC reporting systems.

2603 **OPREP-3 REPORTS.** The OPREP-3 is the single report within the Joint Reporting System for reporting events or special incidents which may attract national or high U.S. Navy interest. The report was established to provide the National Command Authority, through the National Military Command Center, with timely, concise information on which to base an appropriate response to any significant incident. OPREP-3 reports are submitted by the lowest level in the chain of command which has knowledge of the event and access to a communications network capable of relaying the information to the National Military Command Center. An OPREP-3 is normally the first indication to senior authority that an incident has occurred that is of national or Navy interest. The OPREP-3 system is divided into two sub-systems: PINNACLE and NAVY BLUE, with several different types of messages/reports in each sub-system.

A. **Flagwords.** Flagwords are used to indicate the significance of the reports and to ensure fast handling, (e.g., OPREP-3 PINNACLE/NUCFLASH or OPREP-3 NAVY BLUE/FADED GIANT). Initial voice and message reports are NOT to be delayed to obtain further information. Senior commanders in the chain may

NOT require complete initial reports. Any excessive delay in reporting will be briefly explained in the RMKS data set of the record message.

B. **Message Serialization.** All OPREP-3 AND UNIT SITREP record (hard copy) message reports are serialized in sequence by incident, beginning with 001 which is assigned to the first incident in the calendar year. Both reports are to use the same series of sequential numbers vice using one set for OPREP-3 and another set for UNIT SITREP. Additional record message reports concerning the same incident will be assigned sequential letter suffixes, e.g., 001A, 001B, 001C, etc. VOICE report messages of an incident will not be serialized.

2604 **OPREP-3 PINNACLE REPORTS.** The OPREP-3 PINNACLE reports any incident where national level interest is indicated. The initial report will be a FLASH voice report. The report must be made not later than 5 minutes after knowledge of the incident. This voice report shall be followed within 20 minutes of the incident by an initial FLASH record message. OPREP-3 PINNACLE reportable incidents include:

- A. An occurrence which has actual or potential international repercussions, such as creation of tension or undesirable relations between the United States and other countries.
- B. Territorial violations, actual or presumed.
- C. Defection of U.S. or foreign personnel, including asylum requests and incidents.
- D. Natural or man-made disasters or civil disorders which may be of national level interest.
- E. Military operations or unusual incidents which may result in news inquiries at the national level or of an unusual intensity.
- F. Acts of, or attempts at, sabotage by foreign nationals against U.S. forces or installations.
- G. Hijacking or attempted hijacking of ships or aircraft of U.S. or foreign ownership.
- H. Hostile action between two or more foreign forces regardless of the nationalities involved.

- I. Serious personnel injury of a civilian; loss of or substantial damage to civilian property caused by military equipment, such as aircraft or ships, when national level interest is indicated.
- J. Attacks against a nuclear site or attempts to penetrate the site perimeter.
- K. Significant and unorthodox changes in the composition or structure of foreign governments.
- L. Violations of the law of war by or against U.S. Forces, civilian personnel serving with or accompanying the U.S. Armed Forces, and allied military or civilian personnel or their property.
- M. Major military or missile accidents (not qualifying for other types of PINNACLE reports).
- N. Incidents involving reconnaissance activities.
- O. Receipt of critical intelligence.
- P. U.S. search and rescue operations in foreign countries.
- Q. Confirmed or suspected electronic countermeasures, sabotage, and electromagnetic pulse events at tactical warning sensor sites, specific communications nodes, and command center locations.

2605 **OPREP-3 PINNACLE/NUCFLASH.** The O P R E P - 3 PINNACLE/NUCFLASH is used by any unit to report the accidental or unauthorized incident involving a possible detonation of a nuclear weapon which could create risk of outbreak of nuclear war. OPREP-3 PINNACLE NUCFLASH messages require both an amplifying voice report and an initial record message report within 5 MINUTES after transmitting the initial voice report. This message has the highest precedence in the OPREP-3 reporting structure. Incidents reportable under a PINNACLE/NUCFLASH include:

- A. The accidental, unauthorized, or otherwise unexplained detonation of a nuclear weapon or possible nuclear detonation.
- B. The accidental or unauthorized launch of a nuclear-armed or nuclear-capable missile in the direction of, or having the capability to reach, the USSR, other Warsaw Pact countries, or the People's Republic of China.

- C. The unauthorized flight, or deviation from an approved flight plan, by a nuclear-armed or nuclear capable aircraft with the capability to penetrate the airspace of the USSR, other Warsaw Pact countries, or the People's Republic of China.
- D. The detection of unidentified objects by a missile warning system or interference experienced by such a system or related communications that appears to be threatening and could create a risk of nuclear war.

2606 OPREP-3 PINNACLE/BROKEN ARROW REPORTS.

The OPREP-3 PINNACLE/BROKEN ARROW provides the National Command Authority (NCA) and appropriate naval commanders with immediate notification of an accident, incident, or event involving nuclear weapons or nuclear components which does not create risk of outbreak of nuclear war. Reportable nuclear weapon accidents include:

- A. Nuclear detonations.
- B. Nonnuclear detonation or burning of a nuclear weapon.
- C. Radioactive contamination.
- D. Seizure, theft, or loss of a nuclear weapon or component (including jettisoning).
- E. Public hazard, actual or implied.

2607 OTHER OPREP-3 PINNACLE REPORTS

A. The OPREP-3 PINNACLE EMERGENCY DESTRUCTION/DISABLEMENT report is used by any unit to provide NCA and appropriate naval commanders with immediate notification of those operations involving the emergency destruction or disablement of nuclear weapons.

B. The OPREP-3 PINNACLE/EMERGENCY EVACUATION report is used by any unit to provide NCA and appropriate naval commanders with immediate notification of those operations involving the emergency evacuation of nuclear weapons.

C. The OPREP-3 PINNACLE/FRONT BURNER report is used by any unit to provide immediate notification to NCA and appropriate naval commanders with immediate notification of any occurrence having the potential for rapidly moving into

a contingency or general war situation, such as armed attack, harassment, or hostile act against U.S. shipping interests or forces.

2608 **OPREP-3 NAVY BLUE REPORTS.** The OPREP-3 NAVY BLUE reports are used to provide the CNO and other naval commanders with immediate notification of incidents of military, political, or press interests which are of high Navy, rather than national level, interest. The initial report for OPREP-3 NAVY BLUE messages is transmitted immediate precedence with the exception of the OPREP-3 NAVY BLUE/FADED GIANT which is transmitted Flash precedence. The initial report is made by voice within 5 minutes of knowledge of the incident/event. The voice report is to be followed by a record copy message within 20 minutes after knowledge of the incident/event. All OPREP-3 and UNIT SITREP reports are exempt from minimize. OPREP-3 NAVY BLUE messages are submitted on the following types of incidents:

- A. Instances of misconduct which may be reported by local press.
- B. Significant damage to civilian property resulting from actions of member of the department of the Navy.
- C. Near or actual collisions of minor significance of Navy ships or aircraft with civilian ships or aircraft.
- D. Discharges or spills of materials or fluids that might be considered pollutants which endanger critical water areas, have the potential to generate public concern, become the focus of enforcement action, or pose a threat to public health or welfare.
- E. Events involving radioactive material or radiation exposure which do not present a hazard to life, health, or property, but which are of such a nature as to warrant immediate notification of cognizant higher commands. Included in this category are those events having domestic or international implications and those which are likely to give rise to inquiries by the public or press.
- F. Labor strikes which may significantly impair operational readiness, high priority industrial production for Navy projects, or mobility.
- G. Acts or attempts to willfully destroy Navy property.

- H. Bomb threats which are evaluated by the reporting officer as probably valid. [Use a UNIT SITREP for those bomb threats determined to be a hoax.]
- I. Disorders or natural disasters of minor significance if naval assistance is provided or requested.
- J. Death of, critical injury to, or missing commanding officers or senior officers (flag officers or equivalent)
- K. Fires, flooding, explosions, collisions, groundings, or other accidents to naval units.
- L. Initial report of a submarine incident (SUBMISS/SUBSUNK).
- M. The diagnostics of any disease of potential epidemic significance, the presumptive diagnosis of any international quarantinable disease of such widespread proportions among naval personnel that it may affect operational readiness.
- N. Actual or suspected duress situation or unusual occurrence affecting any nuclear capable unit.
- O. Notification of a search and rescue (SAR) incident in the alert or uncertainty phase. [Not all SAR incidents may require continuous submission of OPREP-3 NAVY BLUE reports. The initial OPREP-3 NAVY BLUE for the incident followed by submission of a daily UNIT SITREP to notify CNO and interested commands of the progress of ongoing SAR operations.]
- P. Serious incidents with racial overtones which indicate a serious lack of racial harmony and which could become a matter of high Navy interest.
- Q. The loss at sea of any ships, boats, aircraft, missiles, torpedoes, warheads, live ordnance, cryptological equipment, high technology equipment, or other valuable items.
- R. Violation of the letter or spirit of the US-USSR agreement for prevention of incidents on and over the high seas (INCSEA AGREEMENT).
- S. Major fraud, waste, or abuse, which could involve high level naval interest, media inquiry, or gross inefficiency or mismanagement.

- T. Incidents involving death, serious injury, or serious illness in which the adequacy of medical care is reasonably in question.
- U. Any incident of high level Navy interest which does not fall into the category of any other report in the OPREP-3 PINNACLE or NAVY BLUE series.

2609 OPREP-3 NAVY BLUE/BENT SPEAR. The OPREP-3 NAVY BLUE/BENT SPEAR is used by any unit to provide the CNO and appropriate naval commanders with immediate notification of an unexpected occurrence involving nuclear weapons or nuclear components that does not fall into the NUCFLASH or BROKEN ARROW categories. The OPREP-3 NAVY BLUE/BENT SPEAR is for any unexpected occurrence involving nuclear weapons or nuclear components that:

- A. Results in damage to a nuclear weapon or nuclear component to the extent that major rework, complete replacement, or examination or recertification by the Department of Energy (DOE) is required.
- B. Requires immediate action in the interest of safety, nuclear weapon security, or that may result in adverse public reaction (national or international), or premature release of information. [This would include damage to nuclear weapon carriers such as submarines, aircraft carriers, cruisers, launchers, etc., which could lead to loss/damage to weapons/components.]
- C. Results in the knowledge or suspicion that a nuclear weapon has been partially or fully armed.
- D. Could lead to nuclear weapon accident category events and warrants the informational interest or action by the recipients of OPREP-3 NAVY BLUE/BENT SPEAR messages.

2610 OPREP-3 NAVY BLUE/DULL SWORD. OPREP-3 NAVY BLUE/DULL SWORD reports are used for any unexpected occurrence involving nuclear weapons/components which is not a nuclear accident but meets one of the following criteria:

- A. The possibility of detonation or radioactive contamination is increased.
- B. Errors are committed in the assembly, testing, loading, or transporting of equipment which could lead to substantially reduced yield, increased dud probability, or to unintentional operation of all or part of a weapon's

arming and/or firing sequence.

- C. The malfunction of equipment and material which could lead to a substantially reduced yield, increased dud probability, or to unintentional operation of all or part of a weapon's arming and/or firing sequence.
- D. Any natural phenomenon over which man has no control which results in damage to a weapon or component.
- E. Any unfavorable environment or condition, however produced, which subjects a nuclear weapon to vibration, shock, stress, extreme temperature, or other environment sufficient to cause questioning of the reliability or safety of the weapon. [This includes exposure or suspected exposure of the weapon or major components to electrical or electromagnetic energy which could energize or damage weapon components.]

2611 **OPREP-3 NAVY BLUE/FADED GIANT.** OPREP-3 NAVY BLUE/FADED GIANT reports are used to provide CNO and other naval commanders with immediate notification of any nuclear reactor accident or radiological accident involving naval reactors, other naval nuclear energy devices (excluding nuclear weapons), or radioactive materials under the custody of the Navy.

2612 **OPREP-3 NAVY BLUE REPORT PREPARATION.** The OPREP-3 NAVY BLUE report will identify the type of event being reported and reference (in a REF set) the initial voice report in the initial record message report of the event. The contents of the message will provide a brief account of what happened, what action is ongoing, who is involved, where it happened, why it happened, and what future action is planned. Do not delay an initial report in order to gain additional information.

A. **Initial Voice Report.** The initial immediate precedence voice report will be made not later than 5 minutes after knowledge of the incident and will be identified by the phrase "OPREP-3 NAVY BLUE". Ships at sea will report via the most rapid means available to the FLEET COMMAND CENTER (CINCLANTFLT, CINCPACFLT or CINCUSNAVEUR). The OPREP-3 NAVY BLUE VOICE message template will be used by the originator and addressees to transmit and receive this message. Originators of the voice message should complete only those lines required to pass the essential information in each voice message. The second and/or third lines provided for call-up may be omitted whenever the net procedures permit an abbreviated call-up. A voice message template is provided.

B. Message Reports. The initial IMMEDIATE voice report will be followed within 20 minutes of the incident by an IMMEDIATE initial message report. Any IMMEDIATE amplifying voice report(s) may be followed by IMMEDIATE amplifying message report(s). Precedence for all OPREP-3 NAVY BLUE reports will be IMMEDIATE. The INITIAL IMMEDIATE MESSAGE report will include all the information given in the immediate voice report. The IMMEDIATE amplifying message report(s) will include all the information provided in the IMMEDIATE amplifying voice report(s) plus any additional information available.

C. Other Information

1. In the TIMELOC set include the message status report Initial (INIT), Follow-up (FOLUP), or Final (FINAL).
2. When reporting death or serious injury of U.S. military personnel, names will be withheld pending notification of next of kin unless positive identification is deemed necessary. In such cases, the names can be listed provided the following statement is included: "FOR OFFICIAL USE ONLY. NEXT OF KIN HAVE NOT BEEN NOTIFIED."
3. Give an account of the personnel and/or unit losses or damages which were incurred as result of the incident.
4. The RMKS data set should include one of the following choices: MISHAP REPORT (NOT REQUIRED) (TO FOLLOW) (SUBMITTED). [Consult OPNAVINST 5102.1B to determine if the incident meets MISHAP reporting requirements.
5. The text should contain the commanding officer's estimate of the situation, the impact of the incident on the reporting unit, and the ability of the unit to operate.
6. When the initial voice report or message report of an OPREP-3 NAVY BLUE incident is not made within the prescribed time frame, an explanation of the reason for delay is required.
7. Indicate any press interest in, or press releases generated from, the incident.
8. Indicate whether NIS has been notified or participated.

2613 **UNIT SITREP.** The UNIT SITREP is used to inform higher authorities of events or incidents which do not meet the criteria for OPREP-3 reporting or to augment OPREP-3 reporting. All UNIT SITREP reports are exempt from minimize. UNIT SITREP reports are submitted by individual unit addressed for action to the Immediate Superior In Command (ISIC). The precedence and classification as deemed appropriate by originator. No voice report is required. The content of a UNIT SITREP may be more detailed than that of an OPREP-3, and include developments during the progress of an incident which are not of immediate interest to national or high Navy commands.

2614 **CRITIC REPORTS.** The Critical Intelligence Information (CRITIC) message is designed to report vital information pertaining to a situation affecting the security or best interest of the U.S. to the highest level of government within 10 minutes of its identification. CRITIC reports are assigned the highest precedence and take priority over all message reporting systems. The Defense Special Security Communications System is used to process CRITIC messages. DIAM 58-2 Vol II, part 9 provides formatting information for CRITIC messages, as well as a sample list of when CRITIC messages are required, all of which are SECRET. The only addressee for the initial report, is DIRECTOR NATIONAL SECURITY AGENCY (DIRNSA). A lateral CRITIC is sent to others in the chain-of-command.

SAMPLE OPREP-3 PINNACLE

UNCLAS

MSGID/OPREP-3P/PATRON FOUR ZERO/OOIA/-//

FLAGWORD/PINNACLE/-//

TIMELOC/041715Z/KAESONG KN/FOLUP//

GEHTEXT/INCIDENT IDENTIFICATION AND DETAILS/P-3C ORION ACFT
EXPERIENCED NAVAID TROUBLE AND APPEARS TO HAVE
UNINTENTIONALLY VIOLATED NORTH KOREAN AIR SPACE. ACFT RTB.//
RMKS/COMMANDERS ESTIMATE: NO DAMAGES OR CASUALTIES. WILL
CHECK NAVAID EQUIPMENT ON ALL SQUADRON ACFT. EXPECT
ADVERSE PUBLIC REACTION FROM NORTH KOREAN GOVERNMENT.
ACCUMULATING DATA FROM FLIGHT CREW FOR POSSIBLE PRESS
RELEASE.//

SAMPLE OPREP-3 NAVY BLUE**[REQUIRED ADDRESSEES]**

Action: CNO WASHINGTON DC

FLTCINC:

CINCPACFLT PEARL HARBOR HI

CINCLANTFLT NORFOLK VA

CINCUSNAVEUR LONDON UK

[IMMEDIATE OPERATIONAL/ADMINISTRATIVE

COMMANDERS]INFO: [CHAIN OF COMMAND]
NAVOPINTCEN SUITLAND MD
NAVY JAG ALEXANDRIA VA**[ADDITIONAL ADDRESSEES AS APPROPRIATE]**INFO: UNIFIED COMMANDER:
USCINCLANT NORFOLK VA
3USCINCPAC HONOLULU HI
USCINCEUR VAIHINGEN GE
COMNAVAIRSYSCOM WASHINGTON DC (aircraft accidents) CMC
WASHINGTON DC (Marine Corps related incidents) COMNISCOM
WASHINGTON DC//22D//(incidents of terrorism, civil unrest,
destruction of government property)
COMSC WASHINGTON DC (MSC related incidents)
COMNAVMILPERSCOM WASHINGTON DC (NOTE 1)
CNO OP ZERO ONE WASHINGTON DC (NOTE 1)
NAVSAFECEN NORFOLK VA (fires, flooding, grounding explosions,
collisions, or other accidents to Navy units)
COMNAV MEDCOM WASHINGTON DC (NOTE 1)
NAVINGEN WASHINGTON DC (fraud, waste, abuse)
COMNAVSEASYSYSCOM WASHINGTON DC (naval nuclear powered
ships, nuclear hazard, radiation)**UNCLAS**

EXER/READIEX 3-88

MSGID/OPREP-3/BLEUE RIDGE/001/-//

REF/A/OPREP-3/BLEUE RIDGE/120100Z-/NOTAL//

AMPN/REF A IS INITIAL OPREP-3 VOICE REPORT TO CPF//

FLAGWORD/NAVY BLUE/-//

TIMELOC/120100Z/OLONGAPO RP/INIT//

GENTEXT/INCIDENT IDENTIFICATION AND DETAILS/SN, E-3 WAS
DISCOVERED ATTEMPTING TO DISPOSE OF BLOOD STAINED UNIFORM.
INITIAL INVESTIGATION SHOWS SUSPECT MAY HAVE KILLED FOREIGN
NATIONAL FOLLOWING ARGUMENT IN HOTEL ROOM. IDENTITY OF

FOREIGN NATIONAL HAS NOT BEEN DETERMINED. APPROXIMATE TIME OF EVENT 122000Z APR 90. SUSPECT HFLD AT NAVY BRIG, NAVSTA SUBIC BAY, RP.//

RMKS/NIS INVESTIGATING AND COOPERATING WITH LOCAL POLICE. COMMANDERS ESTIMATE: UNIT CAN CONTINUE PRESENT MISSION. MANILA AND LOCAL PRESS INTEREST HEAVY. PRESS RELEASES MADE BY COMUSNAVPHIL PAO. IDENTITY OF SUSPECT TO BE PROVIDED SEPCOR.//

NOTE 1: (incidents involving death/serious injury, serious misconduct, attempts to destroy Navy property, or racial incidents)

SAMPLE UNIT SITREP

UNCLAS

MSGID/UNIT SITREP/INCHON/002/-//

FLAGWORD/-/UNITSITREP//

TIMELOC/271050Z/NAVSTA NORFOLX/INIT//

GENTEXT/INCIDENT IDENTIFICATION AND DETAILS/ WHILE HANGING A NEW ACCOMMODATION LADDER ON THE STBD SIDE, THE FLOATING CRANE SPRUNG A LEAK CAUSING THE CRANE TO SINK ALONGSIDE THE SHIP. ACCOM LADDER TORN OFF IN PROGRESS AND SANK THE BARGE. TWO SHIPS COMPANY PERS TREATED FOR EXPOSURE WHEN THEY FELL INTO WATER FROM THE LADDER. NO FURTHER INJURIES OR DAMAGE. SHIP CAN CONTINUE PRESENT MISSION. JAGMAN INVESTIGATION INITIATED. //

CHAPTER 27

AUTHORITIES FOR CRISIS ACTION

2701 **INTRODUCTION.** Authorities which support various extraordinary measures which may be taken by the U.S. Government have been compiled for this Deskbook by Colonel J. P. Terry USMC according to the conditions which must exist before they can be implemented. They have been further categorized by the area with which they deal (Manpower, Force Generation/Operations, Logistics, Industrial Preparedness, Infrastructure, and Other). Three conditions are used in this compilation:

A. Increased Preparedness/Pre-Conflict Conditions. Conditions under which the government might wish to take various actions in the absence of Presidential or Congressional declarations of national emergency or other formal declaration.

B. Presidential Declaration of National Emergency. Conditions of sufficient severity to require a specific declaration by the President with regard to the situation.

C. Congressional Declaration of National Emergency. Crisis conditions resulting in Congressionally declared crisis or war.

2702 INCREASED PREPAREDNESS/PRE-CONFLICT CONDITIONS

A. Manpower

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Examine & classify draft registrants	50 U.S.C. App. 54a.	Continuing authority.
Screen IRR	10 U.S.C. 2	Continuing authority.
Voluntary call of IRR/IMA	10 U.S.C. 672(d)	Continuing authority.
Call IRR/IMA for 15 days	10 U.S.C. 672(b)	Continuing authority.

Operational Law**Authorities for Crisis Action**

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Call IRR for training (30 days)	10 U.S.C. 270(4)(2)	Continuing authority.
Call IMA Res any operational mission	10 U.S.C. 673b(A)	Presidential authorization; to augment the active force.
Voluntary recall of retirees	10 U.S.C. 672(d)	Continuing authority.
Involuntary recall of Regular and retirees	10 U.S.C. 688	In the interest of national defense
Involuntarily extend members of Coast Guard	14 U.S.C. 367(4)	When essential to interest; Not exceeding 30 days.
Increase end strength 5%	10 U.S.C. 138(c)(1)(A)	If SECDEF determines in the national interest.
Cancel military leaves	10 U.S.C. 704(b)(3)	Continuing authority; Action to be taken consistent with military regs.
Employ Red Cross under armed forces	10 U.S.C. 2602(a)	Whenever Pres finds it necessary.

B. Force Generation/Operations

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Call 200,000 Selected Reser-vists for 180 days	10 U.S.C. 673b	To augment the active force for any operational mission; Increased in 1989.

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Force deployment in hostilities situations where hostilities are imminent	50 U.S.C. 1542-1544 (War Powers Act)	Continuing Authority; requires withdrawal within 60 days or Congress extends.
Use armed force in the Middle East	22 U.S.C. 1962	President determines it necessary; to counter communist aggression.
Transfer Coast Guard to the Navy	14 U.S.C. 3	When the President directs or upon declaration of war.
Detail military assistance personnel.	10 U.S.C. 712(a)	By President upon application of; to any republic in North, Central Am-22 USC 2761(e) requires reimbursement.
Initiate exercise	Current Def Auth	Continuing authority; may require reprogramming of funds.
Establish naval sea areas and airspace reser-	48 U.S.C. 1706(a)	When deemed necessary for nat'l defense; establishes defense areas around Guam, Am Samoa, vat V.I.
Call Selected Reserve for training (15 days)	10 U.S.C. 762(b)	Continuing authority; Nat'l Gd requires consent of Governor.

C. Logistics

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Purchase	41 U.S.C. 11(a)	Continuing necessary supplies; Allows purchase of certain supplies not to exceed current year's requirements

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Reposition afloat pre-positioning forces	Operational authority of CNO	Continuing authority.
Provide NATO allies logistic support, supplies, and services	10 U.S.C. 2322	Continuing reciprocal authority; requires action.
Suspend or cancel FMS contracts	22 U.S.C. 2791(e)(1)	Under unusual conditions or compelling circumstances if the national law requires contract implementing provisions.
Release war reserve stocks	Operational authority of responsible commander	Continuing authority.

D. Industrial Preparedness

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Prioritize orders	50 U.S.C. App. 2071(a)	To promote national defense.
Sponsor voluntary agreements.	50 U.S.C. App. 2158(c)	Under conditions which pose a direct threat to the national defense or its preparedness programs.
Expedite contract process	50 U.S.C. 1431; 165(a)	To facilitate national defense.
Require acceptance and prioritization of orders	50 U.S.C. App. 468	In the interest of national security.

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Allocate materials and facilities	50 U.S.C. App. 2071	To promote the national defense.
Guarantee loans; Make government loans	50 U.S.C. App. 2091	When essential to national defense, material/product/service would not otherwise be available in a timely manner, best alternative, and demand equal to or greater than domestic capability; or upon a declaration of national emergency by Congress or the President.
Make advance payments on contracts	10 U.S.C. 2307	In the public interest; limited to \$25M without congressional review.
Provide subsidy payments	50 U.S.C. App. 2093(c)	To promote national defense.
Purchase materials and encourage strategic mineral development	50 U.S.C. App. 2093	When essential to the national defense, material would not otherwise be available in a timely manner, best alternative and demand equal to or greater than domestic industrial capability; or declaration of national emergency by Congress or the President.

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Execute right of first refusal of natural resources	43 U.S.C. 1341(b)	In time of war or when necessary for the national defense, and the Congress or the President shall so prescribe.
Restrict specific imports	19 U.S.C. 1962	After Secretary of Commerce conducts an investigation and the President determines the article threatens to impair national security.
Prohibit/curtail export of goods or technology	50 U.S.C. App (2)(A) & App 2404(a)	If it would make a significant contribution to the military potential of any other country which would prove detrimental to national security.
Release strategic and critical materials	50 U.S.C. 98f	Whenever disclosure would be detrimental to national security.
Restrict production of non-essential products.	50 U.S.C. App. 2071.	To promote the national defense; implied authority.
Activate machine tool trigger order program	50 U.S.C. App. 2092	When essential to the national defense, material would not otherwise be available in a timely manner, and demand is equal to or greater than domestic industrial capability; or declaration or a national emergency by Congress or the President.
Prohibit hoarding	50 U.S.C. 2072	To promote national defense

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Suspend competitive procedures	10 U.S.C. 0304(c)(7)	When necessary in the public interest; requires prior report to Congress.
Install equipment in private facilities	50 U.S.C. App. 2093(e)	To aid national defense.
Take possession of facilities	50 U.S.C. App. 488.	In the interest of national security.
Possess water power projects	16 U.S.C. 809	When, in the opinion of the President, the safety of the U.S. so demands.

E. Environmental and Health Exemptions

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Waive water pollution control regulations.	33 U.S.C. 1323(a)	If the President determines it is in the paramount interest of the U.S.; exempts federal affluent sources except new construction & toxic wastes.
Waive prohibition of contracts with water pollution control violators.	33 U.S.C. 1368(d)	If the President determines it is in the paramount of the U.S.
Exempt government facilities from solid waste disposal regulations	42 U.S.C. 6961	If the President determines it to be in the paramount interest of the U.S.

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Waive toxic substance controls	15 U.S.C. 2621	Determination by the President that a waiver is necessary in the interest of national defense.
Exempt new cars & engines from pollution control standards	42 U.S.C. 7522(b)(1)	When the Administrator of EPA finds it necessary for reasons of national security.
Waive prohibition of contracts with air pollution control violators.	42 U.S.C. 7606(d)	If the President determines it is in the paramount interest of the U.S.
Exempt government facilities from noise control.	42 U.S.C. 4903(b)	If the President determines it is in the paramount interest of the U.S.
Make exemptions to occupational health and safety standards.	29 U.S.C. 665	To avoid serious impairment of the national defense.
Exempt government of provisions of the Endangered Species Act	16 U.S.C. 1536(j)	If SECDEF finds it necessary for reasons of national security; granted by Endangered Species Committee; not restricted to industrial preparedness requirements.

F. Infrastructure1. Strategic Lift

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Obtain priority service for transportation	50 U.S.C. App. 2071(a)	To promote national defense.
Activate CRAF I CRAF II, III	EO 11490; DoD-DoT MOU	During a national security-situation, short of a declared defense oriented emergency; when expanded civil augmentation of military activity is required.
Activate voluntary tanker agreements	50 U.S.C. 2158(a)	When the Maritime Administrator finds that a maritime tanker emergency exists.
Activate War Air Service	50 U.S.C. App. 2071(a)	To promote national defense; authorized under the President's general authority to establish priorities and require performance.
Terminate charter agreements	46 U.S.C. 1202(d)	Whenever Pres proclaims the security of the nation makes it advisable.
Activate Nat'l Def Reserve Flt.	50 U.S.C. 1744(a); 46 U.S.C. 1242(a)	(Same as above)
Increase capability under the Sealift Read-inner Program.	46 U.S.C. 1248	Upon agreement between SECDEF and SECTRANS; involves commitment by certain shippers contract to U.S.

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Requisition of foreign vessels lying idle in U.S. waters.	46 U.S.C. 196	A proclamation that the security of the nation makes it advisable or Decl of Nat'l Emergency.
Take possession of foreign flag vessels.	50 U.S.C. 191(a)	Whenever the President proclaims the security of the national defense makes it advisable or during a national emergency declared by the President.
Arm vessels and aircraft	10 U.S.C. 351	During war or when the President determines security is threatened.

2. Real Estate and Facilities

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Terminate leases on non-excess property	10 U.S.C. 2667	To promote the national defense; law does not give blanket but requires inclusion of provisions in leases.
Construct, expand, rehabilitate and equip RC facilities	10 U.S.C. 2233(a)(1)	Continuing authority; excess of \$400 K requires 21 day congressional notification.

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Begin emergency construction	10 U.S.C. 2803	When vital to the national security and urgency precludes delay until the next Military Construction Act; limited to \$300M 21 days after notification of Congress.
Acquire land	10 U.S.C. 2672a	In the interest of national defense; requires 30 days advance notice to Congress.

3. Overseas Infrastructure

Negotiate overflight/basing rights and host nation support agreements	General authority of Executive Department	Continuing authority.
Exercise overflight/basing rights and host nation support agreements	Bilateral agreements with appropriate nations.	Per agreement.

G. Other

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Forbid financial transactions with belligerent states	22 U.S.C. 447	After the President issues a proclamation naming the belligerent states.
Prohibit collection of funds for belligerent states	22 U.S.C. 448	(Same as above)

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Prohibit travel on vessels of belligerent states.	22 U.S.C. 445	After the President issues a proclamation naming the belligerents.
Evacuate non-combatants	EO 11490; DoDD 5100.51	In the event of actual or imminent hostilities or civil disturbances.
Reallocate funds	PL 99-145, Sec 1401.	When necessary in the national interest; allows transfers among various DoD agencies.
Detain armed vessels	18 U.S.C. 963	During a war in which the U.S. is a neutral nation; Within U.S. juris. or on the high seas.
Contract for health care.	10 U.S.C. 1091	Continuing authority.
Relocate the national leadership	50 U.S.C. 404(b)(6); EO 11490	As may be necessary to assure performance of essential functions.

2703 PRESIDENTIAL DECLARATION OF NATIONAL EMERGENCY

A. Manpower

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Exceed end strength limitations	10 U.S.C. 138(c)(4)	During war or national emergency; 60 day limitation.

Operational Law**Authorities for Crisis Action**

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Call delayed entry personnel	10 U.S.C. 673(a)	In time of war or national emergency declared by the President.
Suspend laws regarding promotion, invol. retirement or separation of commissioned and warrant officers	10 U.S.C. 644	In time of war or national emergency declared by Congress or the President; applies to Army, Air Force, Navy, and Marine Corps.
Involuntarily extend reservists	10 U.S.C. 679(d)	If service agreement expires during war or national emergency declared by Congress or the President.
Involuntarily extend members of the Coast Guard	14 U.S.C. 367(3)	During a period of national emergency as proclaimed by the President, and in the interest of national defense.
Call the IRR	10 U.S.C. 673(a)	In time of national emergency declared by the President; Limited to 1M individuals & unit members.
Recall regular Coast Guard retirees	14 U.S.C. 331; 359	In time of war national emergency.
Suspend grade distribution for Naval & Marine Corps officers	10 U.S.C. 5451	During a war or national emergency.
Increase the # of flag/general officers.	10 U.S.C. 526	In time of war or national emergency declared by Congress or the President.

Operational Law**Authorities for Crisis Action**

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Increase the # retired flag/general officers on active duty	10 U.S.C. 688(c).	In time of war or national emergency declared by Congress or the President.
Increase the strength of commissioned officers in the grades of 04-06	10 U.S.C. 526; 3202(c)	(Same as above)
Temporarily appoint commissioned officers	10 U.S.C. 603(a)	(Same as above)
Use the Public Health Service as a branch of the armed services	42 U.S.C. 217	In time of war or emergency proclaimed by the President.
Make emergency indefinite civilian appointments	FPM, Chap 230-1, SubChap 4.	During a national emergency declared by the President or Congress.
Appoint retired military to civilian DoD positions	5 U.S.C. 3326	During a state of national security; waives 180 day period.
Activate the National Executive Reserve.	50 U.S.C. App. 2160	During periods of emergency Defense.
Authorize travel expenses and allowances for members of the Civil Air Patrol	10 U.S.C. 9441(b)(7)	In time of war or national emergency declared by Congress or the President.

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Retain civilians positions of employees who enter the military service	5 U.S.C. 8332(g)	During a period of war or national emergency proclaimed by the President or Congress.

B. Industrial Preparedness

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Impose trade restrictions	50 U.S.C. 1701-02	During a Presidentally declared national emergency; economic sanctions would most likely be imposed long before a declaration.
Amend contracts to protect assignees against reductions or set-offs	31 U.S.C. 3727(d); 41 U.S.C. 15	During a war or national emergency proclaimed by the President or declared by law.
Suspend leases on the outer continental shelf	43 U.S.C. 1341(c)	During a state of war or national emergency declared by Congress or the President.
Suspend sale of helium	50 U.S.C. 167c(d)	Whenever Congress or the President declares war or a national emergency.
Increase working hours	10 U.S.C. 4025; 9025	During a national emergency declared by the President; authorizes working hours for laborers and mechanics working for the Army & Air Force producing military supplies or munitions to exceed 40 hours per week.

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Suspend wage restrictions for laborers and mechanics	40 U.S.C. 276a-5	In the event of a national emergency.
Transport private plant employees	10 U.S.C. 2632(a)(1)(B)	During a war or national emergency declared by Congress or the President; allows military dep'ts to transport employ of private plants manufacturing material for those departments to & from work.
Prosecute individuals who damage defense material	18 U.S.C. 2153	Whenever the U.S. is at war or in times of national emergency declared by the President or Congress.

C. Force Generation/Operations

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Activate the National Disaster Medical System.	Voluntary agreements between government & individual hospitals	When need exists in accordance with individual agreements; provides civilian hospital beds for military use.

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Detail military assistance personnel	10 U.S.C. 712(a)	During war or national emergency, upon application of the country concerned if the Pres deemed it in the interest of nat'l defense.
Exceed troop ceiling in Europe	PL 98-525 Sec 1002(f)	Upon decl of war, armed attack on NATO country or Pres deems it in the interest of nat'l defense.
Suspend restrictions on chemical agents	50 U.S.C. 1515	(Same as above); allows deployment of chemical munitions.
Call Selected to active duty	10 U.S.C. 673(c)	In time of nat'l emergency declared limitation by President; 1M Reserve.
Transfer NOAA assets	33 U.S.C. 855	Whenever, in President's judgment, a sufficient nat'l emergency exists; vessels, equipment, military stations, departments and comm officers.

D. Infrastructure

1. Strategic Lift

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Prioritize traffic	49 U.S.C. 11128	During time of war or threatened war.
Waive requirement to ship 50% of tonnage on private U.S. flag vessels	46 U.S.C. 1241(b)(1)	After a declaration of emergency by Congress, the President or SECDEF

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Suspend the requirement for U.S. crews	46 U.S.C. 8103(a)	During a proclaimed national emergency.
Requisition U.S. owned ships	46 U.S.C. 1242(a)	When the President proclaims that the security of the national defense makes it advisable in entirety.
Take possession and control of vessels	50 U.S.C. 191	After Presidential declaration of a national emergency, if necessary to secure such vessels from damage or injury, or prevent damage or injury to harbors or waters of the U.S., or to secure the observance of the rights & obligations of the U.S.; transfers control of vessels in territorial waters to the gov't.
Prohibit transfer of vessels or shipping facilities	6 U.S.C. 835	When the U.S. is at war or during any national emergency, the existence of which is proclaimed by the President.

2. Real Estate and Facilities

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Make most efficient and economical use of RC facilities	10 U.S.C. 2231(4), 2235(b)(2), 2236(d)(2)	In time of war or national & emergency.
Lift certain lease restrictions	40 U.S.C. 278b	During a war or national emergency declared by Congress or the President.

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Begin urgent construction projects	10 U.S.C. 2808	In the event of a declaration of war or a Presidential declaration of national emergency; projects may be undertaken only within the total amount of funds that have been appropriated for military construction.
Waive requirements to dispose of surplus property through public bidding	40 U.S.C. 484(e)(3)	If necessary in the public interest during a period of national emergency declared by the President or Congress; the national security will be promoted; public exigency will not admit of delay; delay would adversely affect national economy & established fair market value & other satisfactory terms can be obtained by negotiation.
Recapture formerly military real property	Individual deeds and Acts of Congress dealing with various sales.	Vary depending on specific instrument.
Recapture airports	50 U.S.C. App 1622(g)(2)(E)	During a national emergency declared by the President or Congress; allows control session of airports at which previously disposed surplus property is located.
Build temporary air bases or fortifications	10 U.S.C. 4776; 9776	In an emergency when the President considers it urgent.

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Withdraw public lands	43 U.S.C. 155	In time of war or national emergency declared by the President or Congress.
Waive construction permits, licenses and renewals for communication stations	47 U.S.C. 308(a)	During a national emergency proclaimed by the President or declared by Congress.
Amend rules close or control wire communications facilities	47 U.S.C. 606(c)	Upon Presidential proclamation of war or threat of war.
Control or close communications stations	47 U.S.C. 606(c)	Upon Presidential proclamation of war or threat of war, or a state of public peril or disaster, or other national emergency or to preserve U.S. neutrality.
Control banking	12 U.S.C. 95a	During an emergency proclaimed by the President.

E. Other

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Allow transport of designated persons on Naval vessels	10 U.S.C. 7224	In time of war or during a national emergency declared by the President.
Furnish VA medical care to active duty armed forces.	38 U.S.C. 5011A	During a war or national emergency declared by the President or Congress, that involves the use of armed forces in armed conflict.

2704 CONGRESSIONAL DECLARATION OF NATIONAL EMERGENCY**A. Manpower**

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Call Standby reservists	10 U.S.C. 672(a) & 674(b)	In time of war or national emergency declared by Congress when the Service Secretary determines there are insufficient qualified members of the Ready Reserve.
Recall retired reservists	10 U.S.C. 762(a)	In time of war or national emergency declared by Congress when enough individuals in active reserve status or ING are not available.
Suspend federal recognition provisions for National Guardsmen	32 U.S.C. 111	In time of war or national emergency declared by Congress.

B. Industrial Preparedness

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Expedite gov't contracts	50 U.S.C. 82	In time of war; allows production to place, modify orders for war material, take over uncooperative facilities & purchase products.
Take possession of manufacturing plants	10 U.S.C. 4501	In time of war or when war is imminent; if manageable plant fails to manufacture war materials for the Army.

C. Infrastructure1. Strategic Lift

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Activate NATO/ Korean Civilian Aircraft Augmentation Program	Bilateral agreements with partici- pating nations	(Classified)
Take posses- of transportation systems	10 U.S.C. 4742; 974	In time of war.

2. Real Estate and Facilities

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Lease buildings in in the District of Columbia	10 U.S.C. 4780	In time of war or when war is imminent.
Recapture TVA property	16 U.S.C. 8315	In case of war or national emergency declared by Congress; provides capability for the government to manufacture explosives and other war materials.

D. Other

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Prioritize communications	47 U.S.C. 606(a)	During war; allows President to establish preference and priority to wire and radio communications carriers.

<u>Action</u>	<u>Authority</u>	<u>Conditions/Remarks</u>
Transfer FAA functions to DoD	49 U.S.C. 1343(c)	In the event of war.
Remove enemy aliens	50 U.S.C. 21	Whenever there is a declared war, or any invasion or predatory incursion is perpetrated or threatened against the U.S.
Authorize electronic surveillance	50 U.S.C. 1811	Following a declaration of war by Congress; allows surveillance without a court order to acquire foreign intelligence.

2705 ADDITIONAL MEASURES

A. Increased Preparedness/Pre-conflict. Additional measures include registration of health care professionals and filling POMCUS and PWRMS.

B. Presidential Declaration of National Emergency. In these circumstances, the Government may:

1. Provide for induction (currently prohibited by 50 U.S.C. App 467(c));
2. Provide for health care professional draft;
3. Authority to produce from petroleum reserves (currently prohibited by 42 U.S.C. 6504(a));
4. Authority to expedite waivers of any state or federal regulation that could impede the production or transportation of goods and services procured by DoD;
5. Relax small business set aside requirements;
6. Relax labor constraints, e.g., freeze wages, mandatory transfer of labor from non-Defense industry, authority to suspend

clause in labor contracts which limit selection and assignment;

7. Waive warranty requirements;
8. Waive contractual liability with co-production sources;
9. Provide for anti-trust exemptions for international agreements;
10. Provide capability for DoD to extend effectively all arms sales and security assistance capabilities deemed necessary to waging war in Europe to cover any other geographical area of the world;
11. Provide exemptions to Freedom of Information Act and Privacy Act requirements during national emergency; and
12. Relax truth in negotiating requirements.

C. Congressional Declaration of National Emergency. In these circumstances, the service academy instruction may be reduced to 3 years and the Government may impose controls on wages, salaries, prices and rents.

CHAPTER 31

FOREIGN CRIMINAL JURISDICTION

3101 REFERENCES

- A. U.S. Navy Regulations, 1990, arts. 0822, 0828
- B. SECNAVINST 5820.4F, Status of Forces Policies, Procedures and Information
- C. OPNAVINST 3100.6D [Serious incident reporting]
- D. JAG Manual, Chapter 6
- E. Fleet Deployment/Legal Manual
- F. Applicable Status of Forces Agreement

3102 **AFLOAT.** An American warship is considered an instrumentality of the nation in the exercise of its sovereign power, an extension of U.S. territory. As such, it is under the exclusive jurisdiction of the United States and immune from any other nation's jurisdiction during its entry and stay in foreign ports and territorial waters as well as on the high seas.

A. Attachment or libel in admiralty may not be taken or effected against a warship for recovery of possession, for collision damage, or for salvage charges. The commanding officer of a ship shall not permit his ship to be searched by foreign authorities nor shall he allow personnel to be removed from the ship by foreign authorities. If the foreign authorities use force to compel submission, the commanding officer should resist with the utmost of his power. Except as provided by international agreement, the rules for a shore activity are the same. U.S. Navy Regulations, 1990, Art. 0822, 0828.

B. The laws, regulations, and discipline of the United States may be enforced on board a U.S. warship within the territorial precincts of a foreign nation without violating that nation's sovereignty. A warship present in a foreign port is expected to comply voluntarily with applicable health, sanitation, navigation, anchorage, and other regulations of the territorial nation governing her admission to the port. Failure to comply may result in the lodging of a diplomatic protest by the host nation and the possible ordering of the warship to leave the port and territorial sea. If such sanctions were imposed, immunity from seizure, arrest or detention by any legal means would remain in force.

3103

OVERSEAS ASHORE

A. Servicemembers. Military personnel visiting or stationed ashore overseas are subject to the civil and criminal laws of the particular foreign state ("territorial jurisdiction"). Under most status of forces agreements (SOFAs), the question of whether the U.S. servicemember will be tried by U.S. authorities or by foreign authorities for crimes committed depends on which country has "exclusive" or "primary" jurisdiction.

1. Exclusive jurisdiction exists when the act constitutes an offense against only one of the two states, e.g., unauthorized absence. Those areas constituting violations under both the UCMJ and foreign law are subject to concurrent jurisdiction. This situation raises the question of which state has "primary" jurisdiction. The United States will normally have primary jurisdiction over military personnel for:

- a. Offenses solely against the property or security of the United States;
- b. offenses arising out of any act or omission done in the performance of official duty; and
- c. offenses solely against the person or property of another servicemember, a civilian employee, or a dependent.

2. The host country will retain the primary right to exercise jurisdiction in all other concurrent jurisdiction situations. If a member commits a crime in which the host country has primary jurisdiction, the accused will be prosecuted under the laws and procedures of that country's criminal justice system and, if convicted, the accused will be punished in accordance with those laws. This rule exists unless the host country waives its primary right to exercise jurisdiction. This is possible because the United States always retains criminal jurisdiction under the UCMJ over all military personnel as an exercise of personal jurisdiction.

B. Civilians. Special privileges and exceptions from the application of foreign local law to U.S. bases overseas are governed by a "Base Rights Agreement" between the two governments. Such agreements may provide for the exercise of police power by the United States within the confines of the base, but this exercise will usually be concurrent with that of the foreign sovereign. Residual sovereignty over the base usually is retained by the foreign government, and criminal offenses committed by U.S. nonmilitary personnel while on the base are generally triable in foreign criminal courts. Despite recent efforts to secure legislation, it remains questionable whether any United States court has jurisdiction to try U.S. civilians for crimes committed overseas absent a time of war.

C. U.S. Policy. As a matter of policy, we attempt to maximize U.S. jurisdiction and seek waivers in cases where the U.S. does not have primary jurisdiction. SECNAVINST 5820.4 series directs in paragraph 1-4(a) that "[c]onstant efforts will be made to establish relationships and methods of operation with host country authorities which will maximize U.S. jurisdiction to the extent permitted by applicable agreements." Requests for waiver of jurisdiction will be made for all serious offenses committed by servicemembers regardless of the lack of a status of forces agreement or the claims of exclusive jurisdiction by the host country.

D. Reporting. Whenever a servicemember is involved in a serious or unusual incident outside the U.S., report the matter to the Judge Advocate General. Reports are also required via OPREP 3/NAVY BLUE under OPNAVINST 3100.6D for major incidents involving foreign criminal jurisdiction. The message must provide information regarding: identifying the servicemember; nature of alleged offenses; status of individual when incident occurred; and present status of individual. Fleet legal manuals contain examples of messages with appropriate via addressees. Ensure that all follow-up/SITREPS are sent. Serious or unusual incidents will include any case in which any of the following circumstances exist:

1. Pretrial confinement by foreign authorities;
2. actual or alleged mistreatment by foreign authorities;
3. actual or probable publicity adverse to the United States;
4. congressional, domestic or foreign public interest is likely to be aroused;
5. a jurisdictional question has arisen;
6. the death of a foreign national is involved; or
7. capital punishment might be imposed.

E. Custody rules. When a servicemember is arrested and accused of a crime, the existing SOFA with the host country determines which country retains custody of the individual. Generally, the United States will maintain custody where we have primary jurisdiction over the offense. When the foreign nation has primary jurisdiction over a servicemember arrested by the United States, we will retain custody until the member is charged; if the host country made the arrest, it may maintain custody or turn the member over to U.S. authorities until the criminal proceedings are completed.

F. Delivery. Except when provided by agreement between the United States and the foreign nation concerned, there is no authority to deliver persons in the Department of the Navy to foreign authorities. JAGMAN, § 0609.

G. Foreign Pretrial Confinement. Where a U.S. servicemember is in the hands of foreign authorities and is charged with the commission of a crime, regardless of where it took place, the commanding officer should report the matter to the Judge Advocate General and other higher authorities for guidance.

1. Seek Release. To secure the release of U.S. military personnel held by foreign authorities, U.S. military authorities may give assurances that the servicemember will not be removed from the host country except on due notice and adequate opportunity by the foreign authorities to object to that action. An informal personal request can be made by the: senior shore patrol officer; commanding officer's designee; SOPA; or U.S. Country Representative in the area. Foreign authorities may be assured that the release will not affect jurisdiction; the alleged offender will be made available for questioning and returned for trial. In appropriate cases, military authorities may order pretrial restraint of servicemembers in a U.S. facility to ensure their presence at trial on foreign charges.

2. Visitation. Commands must ensure the member is treated fairly. Legal assistance, medical attention, food, bedding, clothing and other health and comfort supplies will be provided to the member. The command must ensure a physical examination is conducted within the first 48 hours or whenever reasonably practicable. The conditions of confinement and health and welfare must be observed by the commanding officer or his designee and reported at least every 30 days. A DD Form 1602 Report of Visit-US Personnel in Foreign Penal Institution (NAVJAG 5820-2) must be prepared for each visit. The member should also be visited by a medical representative and chaplain.

H. Procedural Safeguards. If a servicemember is to be tried for an offense in a foreign court, he is entitled to certain safeguards. These rights vary somewhat, depending on how the SOFA is couched. To illustrate, the rights guaranteed under the NATO SOFA include the following:

1. A prompt and speedy trial;
2. to be informed in advance of trial of the specific charge or charges made against him;
3. to be confronted with the witnesses against him;
4. to compel the appearance of witnesses in his favor if they are within the jurisdiction of the state;

5. to have legal representation of his own choice;
6. to have the services of a competent interpreter if necessary; and
7. to communicate with representatives of the U.S. Government and, when the rules permit, to have such representatives present at his trial.

I. Right to Counsel. The member will have the right to counsel paid for by the United States if:

1. The act complained of occurred in the performance of official duty;
2. the sentence that is normally imposed includes confinement, whether or not suspended;
3. capital punishment might be imposed;
4. an appeal is made from any proceeding in which there appears to have been a denial of the substantial rights of the accused;
5. conviction of the alleged offense could form the basis for administrative discharge proceedings for misconduct as a result of civilian court disposition; or
6. the case, although not within the criteria above, is considered to have significant impact on the relations of U.S. forces with the host country, or involve any other particular U.S. interest.

J. Hiring Counsel. The member will select counsel from a list of qualified, competent, and experienced trial attorneys. Fees will be reasonable and will be paid by the U.S. Government. The contract will be signed only for the present trial; a separate contract will be signed if necessary for any appeal. The contracting officer will normally be a local judge advocate.

K. Other Costs. Under 10 U.S.C. § 1037, the government will also pay for other costs, including: court costs; bail costs (reimbursement required); charges for copies of records; printing and filing fees; interpreter fees; witness fees; and other necessary and reasonable expenses, but not actual fines or damages. Payment is made by the command's disbursing officer in local currency.

L. Trial Observers. Local judge advocates designated by Chief of the Diplomatic Mission, selected for their competence, experience, and maturity of judgment will act as trial observer and will attend all proceedings and note the

progress of the trial. A judge advocate may not serve in such capacity after having served in a legal capacity for the accused in a matter arising out of the same circumstances. The observer is not a participant in the defense of the servicemember, but rather reports to higher authority as to whether the safeguards guaranteed by the SOFA were followed. Before the trial, the observer should review police reports and supporting documents to become familiar with the facts of the case. If appropriate, the observer may advise counsel of the rights of the accused's rights under the SOFA and assist the court and defense counsel in obtaining witnesses and evidence available from U.S. sources, if requested. After the trial, they submit a formal report containing a factual description or summary of the proceedings and an informed judgment on any failure to comply with the procedural safeguards under the SOFA, i.e., whether the accused received a fair trial. In particular, the observer should note any discrimination based on race, creed, color, or national origin.

M. Trials in Absentia. Check the laws of the particular country to see if they allow trials in absentia. Such trials are allowed in Italy, for example. This tool allows the accused to leave the country before the completion of judicial proceedings. On receiving an absentia request, the foreign authorities typically will consent to the removal and either agree or refuse to waive their right to try the individual in absentia. If the foreign authorities refuse to waive their right to try the individual in absentia, the accused must be advised that he may be tried in absentia and convicted. The member may be removed if he consents in writing despite the prospect of trial and conviction in absentia.

3104 SOLATIA. In certain countries, custom dictates offering a victim or his family a token gift of fruit, flowers, or money for injury, death, or property damage. Depending on the local culture, such token expressions of remorse can affect the resolution of criminal charges. NAVCOMP MANUAL 075146 permits the payment of solatia from operation and maintenance funds under certain circumstances, as determined by the appropriate country commander. Consult the area coordinator or the nearest NLSO to determine the propriety of paying solatia from official funds in a particular country.

CHAPTER 32

LIBERTY RISK

3201 REFERENCES

- A. Art. 0921, U.S. Navy Regulations, 1990, [The senior officer present shall regulate leave and liberty.]
- B. Art. 0917, U.S. Navy Regulations, 1990, [The senior officer present shall will impress upon his officers and men to avoid any conflict with foreign authorities and local inhabitants.]
- C. MILPERSMAN 3030150 [Liberty may denied when a health risk exists.]

3202 **BASIS.** A commander may curtail a member's liberty if the evidence shows that the individual intends, or has a demonstrated propensity, to behave improperly in a liberty status. Misbehavior at a previous liberty port is but one of many factors used in making a determination; it is not dispositive. The commander has substantial discretion to make these decisions but they should generally be limited to cases involving a serious breach of the peace or flagrant discredit to the Navy. Since the liberty risk program is intended to preserve good U.S foreign relations, the program applies only overseas, whether afloat or ashore.

3203 **DUE PROCESS.** The commander must afford adequate administrative due process safeguards. After reviewing each case individually, the commander should advise the member in writing of his assignment to the program, the basis for the action, and their opportunity to respond, e.g., request mast. The commander should consider whether less restrictive means, e.g., liberty hours, will be effective in a given case before curtailing all liberty. The command should use incremental categories ("A," "B," "C," "D") where possible. The CO must periodically review each assignment to assess whether continued curtailment of liberty is justified.

3204 **PROCEDURES.** The program is administrative, not punitive restraint. Thus, a servicemember's liberty may be curtailed regardless of whether charges are pending at a court-martial or NJP. Conversely, members punished at NJP or a court-martial should not be automatically placed on liberty risk unless their offense and predilections otherwise justify that assignment. No service record entries are made. Members on liberty risk should NOT be required to muster or work with members undergoing punitive restriction. If not proper, assignment to liberty risk may constitute a prior punishment or pretrial restraint, thereby inadvertently starting the speedy trial clock. Other legitimate bases for limitations

on liberty outside the military justice system include: EMI, bona fide training, operational necessity, medical reasons, safety/security of personnel, and command integrity. Liberty may also be denied if a member's appearance is contentious, inflammatory, lewd, or unlawful.

CHAPTER 33

PRIVATE INTERNATIONAL LAW

3301 **INTRODUCTION.** Private international law is the body of national laws applicable to disputes between private persons, in domestic courts or private arbitration, arising from activities having connection to two or more nations.

A. **Application.** The SJA may encounter private international law issues in a variety of contexts, e.g. commercial and business transactions (sales, trade, taxation, etc.); family law matters (child abduction across international boundaries, intercountry adoption, etc.); and civil litigation (service of documents abroad, choice of law, proof of documents, enforcement of foreign judgments, etc.). In the United States, these areas have traditionally been governed by state rather than federal law.

B. **Conflicts of Law.** International conflicts of law is less developed than domestic, i.e., interstate conflicts of law. In recent years, the United States has become more active in international organizations seeking unification and harmonization of private international law. The United States participates in the U.N. Commission on International Trade Law (UNCITRAL) [primarily commercial law]; the Hague Conference on Private International Law; the International Institute for the Unification of Private Law (UNIDROIT); and the Organization of American States (OAS). Nevertheless, the United States is party to few of the conventions and statutes drafted by these organizations.

3302 INTERNATIONAL BUSINESS TRANSACTIONS

A. **International Sale of Goods.** The U.N. Convention on Contracts for the International Sale of Goods (1980)[51 Fed. Reg. 6262-80 (March 26, 1987); 52 Fed. Reg. 46014 (December 3, 1987)] governs contracts of sale of goods where the places of business of both parties are in states party to the Convention. This convention entered into force for the United States on 1 January 1988.

B. **Other UNCITRAL Conventions.** The United States is not a party to several other conventions including: the Convention on the Limitation Period in the International Sale of Goods (1974, with 1980 Protocol); the Convention on the Carriage of Goods by Sea (1978) ["Hamburg Rules" - not yet in force]; and the Convention on International Bills of Exchange and International Promissory Notes (1988). Hague agreements are being drafted or considered in areas of electronic fund transfers, liability of operators of transport terminals, standby letters of credit and guarantees, etc.

3303 **INTERNATIONAL TAXATION.** Treaties exist to avoid double taxation. Over 35 bilateral treaties limit U.S. tax on nonresidents in the United States (primarily multinational enterprises). Status of forces provisions, e.g., article X of NATO SOFA, exempt members from local income tax based on their physical presence in the country. On the domestic side, the Foreign Earned Income Exclusion, I.R.C. § 911, excludes up to \$70,000 of foreign earned income. In that context, foreign earned income does not include U.S. government salaries, but does include income from nongovernment U.S. organizations. In addition, foreign tax credits and deductions exist for foreign source income taxes, e.g., I.R.C. §§ 901, 904).

3304 **FAMILY LAW MATTERS**

A. Marriage. Host country law generally controls the validity of a marriage. Substantial private international law on marriage exists in Europe. See the immigration chapter in this Deskbook for additional information on immigration of foreign spouses.

B. Child custody. The Hague Convention on Civil Aspects of International Child Abduction, 19 I.L.M. 1501 (1980)[51 Fed. Reg. 10,494-516 (March 26, 1986)] entered into force for the United States on January 1, 1988. The Convention is implemented by the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610. Countries are required to return an abducted child promptly to his country of habitual residence without inquiring into the merits of competing parental claims. Central authorities may order the return of children without judicial involvement. No prior custody order is required. In the United States, either state or federal court actions may be brought. An exception to expeditious return rule exists where return would expose the child to physical or psychological harm or place the child in an intolerable situation. Thus far, the exception has been narrowly interpreted. Mohsen v. Mohsen, 715 F.Supp. 1063 (O. Wyo. 1989); Sheikh v. Cahill, 546 N.Y.S.2d 517 (Sup. Ct. 1989).

C. Wills. Several international provisions in this area exist but are not in force for United States, e.g., Convention Providing a Uniform Law on the Form of an International Will (1973); Hague Convention on the Law Applicable to Trusts and on their Recognition (1984)(Signed by but U.S. not in force). To date, only six states have implemented the Uniform International Wills Act.

D. Other Provisions. Other Hague and U.N. Conventions not in force for the U.S. include those concerned with marriage (draft), matrimonial property (draft) recognition of divorce, maintenance, enforcement of child support orders, Intercountry adoption, protection of minors, etc.

3305

CIVIL LITIGATION

A. Service of Process. A party since 1969, the United States must observe the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention), 20 U.S.T. 361. (1965).

1. Party Nations. This convention requires service through a central authority, or by postal service unless this is objected to by a state. See U.S.C.A. sections following Fed. R. Civ. P. 4; Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104 (1988).

2. Nonpart Nations. In countries not a party to the Convention, direct service of process or use of letters rogatory is required. Direct service, e.g., Fed. R. Civ. P. 4(e) and (i), may violate receiving state law. Letters rogatory are sent from domestic courts through diplomatic channels but tend to take a long time to process. The 1975 Inter-American Convention on Letters Rogatory, with 1979 Additional Protocol entered into force for the United States on 27 August 1988. This convention created a legal regime for service of process similar to Hague Service Convention.

3. Status of Forces Agreements. Some SOFAs provide for service of civil process by German courts on SOFA personnel through sending state liaison office. The provisions may not be applicable to U.S. court documents.

B. Evidence. Entered into force for the United States in 1972, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention), 23 U.S.T. 2555 (1970) is designed to ameliorate problems of direct discovery and blocking statutes. Letters of request are sent through designated central authorities. The letters must be followed when the evidence is located in a signatory country. Societe Nationale Industrielle Aerospatiale v. U.S. District Court, 107 S.Ct. 2542 (1987). A regional counterpart, the Inter-American Convention on the Taking of Evidence Abroad (1975, with 1980 Protocol), is not in force for the United States. Similarly, the United States is a signatory to the Convention Abolishing the Requirement for Legalization of Documents Used Abroad, T.I.A.S. No. 10072 (1981) but the convention is not in force.

C. Recognition and Enforcement of Foreign Judgments. Under principles of comity, foreign judgments will be recognized in U.S. courts. Hilton v. Guyot, 159 U.S. 113 (1885). Generally, a summary judgment can be obtained unless one of the exceptions to the general rule encouraging recognition under comity or the Uniform Act applies. Sixteen states have enacted the Uniform Money Judgments Recognition Act, 13 Unif. Laws Annot. 269-70 (1980). The United States is not a party to the Hague Convention on Enforcement of Judgments. Consider also the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), 21 U.S.T. 2517 (1958).

3306 **COMPLIANCE WITH COURT ORDERS OVERSEAS.** SECNAVINST 5820.4E (of 29 May 90) Compliance with Court Orders by Department of Navy Members, Employees, and Family Members Outside the United States implements DoD Directive 5525.9 of 27 Dec 88, and establishes procedures for returning servicemembers, dependents, and DoN employees to the United States to comply with federal and state court orders when the individual has been charged with or convicted of a felony, or ordered to show cause in contempt proceedings. The regulations are intended to prevent servicemembers from using overseas duty assignments as a refuge in child custody disputes. The SECNAVINST makes CMC the decisional authority for Marine Corps cases and limits delegation of this authority to within Headquarters Marine Corps.

CHAPTER 34

FOREIGN CLAIMS

3401 REFERENCES

- A. Foreign Claims Act, 10 U.S.C. § 2734
- B. JAGMAN, Chapter VIII
- C. DoD Directive 5515.8 of 9 June 1990
- D. JAGINST 5890.1

3402 **PURPOSE AND SCOPE.** The Foreign Claims Act (FCA) seeks to promote friendly relations with, and in, foreign countries through the prompt settlement of claims. The FCA covers claims death, injury, property damage, or loss at the hands of U.S. military forces or otherwise incident to noncombatant activities. Geographically, the claim must arise outside the U.S. and its territories, commonwealths or possessions.

A. Valid Claimants. Valid FCA claimants include foreign countries, their political subdivisions, and their inhabitants. Inhabitants does not include servicemembers, government employees, dependents, or U.S. tourists vacationing overseas.

B. Claims Not Payable. Although FCA coverage is broad, e.g., even crimes are compensable, some areas have been carved out. Specifically, FCA cannot redress admiralty claims, patent infringement claims, or subrogated claims. Nor can FCA be used when the claim arises out of a member's private contractual obligations or paternity. FCA claims will not be paid on compassionate grounds or where the claimant has been contributorily negligent when that doctrine is followed under local law.

1. Combatant Claims. Claims of national governments (including their political subdivisions and controlled corporations) engaging in combat with the United States or its allies shall not be paid. Claims resulting from combat activities are not payable, except that claims arising from an accident or malfunction incident to aircraft operations, including airborne ordnance, occurring while preparing for, going to, or returning from, a combat mission may be paid.

2. Scope of Employment. As a general rule, scope of employment is immaterial. If, however, a claim arises from the act of a U.S. employee who is an indigenous person, prisoner of war, or interned enemy alien, scope of employment is a prerequisite to United States responsibility. Claims arising from the operation of a U.S. armed forces vehicle by a prisoner of war, or interned enemy alien should be settled if local law imposes liability on the owner of the vehicle under the circumstances.

C. Single-Service Claims Responsibility. DoD Directive 5515.8 assigns "single-service claims responsibility" to individual military departments for processing claims in specified foreign countries. This may restrict the use of the regulations in this chapter by authorizing the assigned military department to process claims that would otherwise be cognizable under this chapter. Consult DOD Directive 5515.8 regarding geographic responsibility assignments before processing FCA claims to ensure your action is authorized. The Officer in Charge of the U.S. Sending State Office for Italy, for example, has authority to process all FCA claims arising in Italy.

3400. **PRESENTING THE CLAIM.** FCA claims must be presented in writing to the appropriate U.S. military authorities within 2 years after the incident giving rise to the claim. The claim must: state the time, date, place, and nature of the incident; state the nature and extent of any injury, loss, or damage; and request compensation in a definite amount, in the local currency. A properly completed Standard Form 95 or other written demand, signed by the claimant or an authorized agent, containing the same essential information, is sufficient. A claim may be signed by either the injured party or an authorized agent, e.g., the claimant's lawyer. Agents must show their title or legal capacity and present evidence of their authority to sign the claim.

3404 **PROCESSING.** Processing FCA claims is administrative only. The tool is the Foreign Claims Commission. All commanding officers of the Navy and Marine Corps have authority to appoint a Commission, unless restricted by a competent superior commander. For FCA purposes, the term "commanding officer" includes: the Judge Advocate General; the OIC of the U.S. Sending State Office for Italy; Chiefs of Naval Missions (including chiefs of the naval section of military missions); Chiefs of Military Assistance Advisory Groups (including chiefs of the naval section of such groups); and naval attaches. The CO can appoint a Commission for each claim or have a standing Commission to hear all claims. The Commission's settlement authority depends on the number and type of officers appointed to the Commission.

A. Composition of the Commission. A Commission shall be composed of either one or three members. Alternate members may be appointed where

circumstances require, and may be substituted for the principal members for specific cases by order of the appointing authority. The appointing orders should indicate which member is president of a three member Commission.

B. Qualifications of Members. Members appointed to serve on a Commission shall be commissioned officers of the Navy or Marine Corps of sufficient grade and experience to carry out the purpose of the Commission, consistent with the Foreign Claims Act. Whenever possible, at least one member of the Commission should be a judge advocate. An officer of another armed force may serve on a Navy or Marine Corps Commission only with the consent of the Secretary of his department, or a designee, and will perform duties according to the JAG Manual. When an officer of the Navy or Marine Corps is asked to serve on a Commission of another armed force, the immediate commander of the officer requested may determine availability pursuant to 10 U.S.C. 2734(a).

C. Investigation. No formal procedures control the investigation of a foreign claim. Typically, an investigation not requiring a hearing will satisfy the Commission's fact-finding needs. A transcript of witness testimony is not required; a summarization of the substance, preferably signed, will suffice. Formal rules of evidence are inapplicable.

D. Commission Action. The Commission will review the claim and the investigation. If necessary, the Commission may direct additional investigation. In addition, the Commission:

1. Will recommend the appropriate adjudication of the claim by majority vote;
2. may negotiate any private, voluntary settlement between the claimant and any wrongdoers;
3. may negotiate for settlement of the FCA claim within the limit of the adjudicating authority;
4. will report its recommendation and reasons therefor, to the appropriate adjudicating authority [a checklist for the Commission's report appears in the appendix to this chapter];
5. will prepare appropriate documents to notify the claimant of actions taken;
6. will pay any approved claim, as discussed below; and

7. will prepare and obtain the signed release of claimant upon acceptance of payment.

E. SJA Role. The SJA provides advice, guidance, and review to the commanding officer, Commission, and claims investigating officer on policies and procedures. The cognizant NLSO may also lend assistance.

3405 **ADJUDICATING AUTHORITY.** A Commission may consider claims in ANY amount and may recommend payment of a claim in full or in part, or denial of a claim.

A. Claims Not Exceeding \$20,000.00. Commission recommendations for payment or denial of claims up to \$20,000.00 may be approved by the appointing authority in whole or in part. The amount which may be PAID depends on the Commission's composition:

1. One officer Commission: \$5,000.00.
2. One judge advocate Commission: \$10,000.00.
3. Three officer Commission: \$10,000.00.
4. Three officer Commission with
at least one judge advocate: \$20,000.00.

B. Claims in Excess of Limits or \$20,000.00. Commission recommendations for payment or denial of claims in excess of the limits of their adjudicating authority or in excess of \$20,000.00 shall be forwarded through the appointing authority for action by higher authorities as discussed below.

3406 FORWARDING REPORTS

A. Claims Within Adjudicating Authority. The Commission sends the original of the report and all related papers to the appointing authority for action. The appointing authority may approve or disapprove the recommendation and claim, in whole or in part, and pay the claim as appropriate. In the alternative, the appointing authority may return the claim with instructions to the Commission.

B. Claims in Excess of Adjudicating Authority. The Commission sends the original of the report and all related papers to the appropriate higher authority, via the appointing authority, for action. The following officers may approve or disapprove

the recommendation and the claim, in whole or in part, pay the claim, or return the claim with instructions to the appointing authority or the Commission:

1. The Deputy JAG, the AJAG (General Law), or the Deputy AJAG (Claims and Tort Litigation), and, with respect to claims arising in Italy, the Office in Charge of the U.S. Sending State Office for Italy, may act on FCA claims up to \$50,000.00;

2. the Judge Advocate General may act on FCA claims between \$50,000.00 and \$100,000.00; and

3. SECNAV may pay the first \$100,000.00 of any FCA claim and report the excess to the Comptroller General for payment under 10 U.S.C. 2734(d).

3407 **NOTIFICATION.** Appointing authorities shall promptly notify the claimant in writing when claims within their adjudicating authority have been approved or denied. Notifications should advise the claimant of the approved recommendation or Commission action with a brief explanation of their reasons. Notify the claimant when the claim has been referred to higher authority for action. The claimant will not be told the amount recommended by the Commission or be shown the Commission's report. Final action taken by higher authority will be forwarded to the claimant via the appointing authority with a copy to the Commission. Where resources permit, translate the notification into the claimant's language.

3408 **PAYMENT**

A. Documentation. When a recommendation for payment has been approved by the appropriate authority, the appointing authority shall submit the original and one copy of the approved Commission report to the nearest Navy or Marine Corps disbursing officer for payment of the claim. If no Navy or Marine Corps disbursing officer is reasonably available, send the documents to the nearest U.S. disbursing officer of any agency and ask them to pay the claim. Advance payments may be made. All payments shall be made in the currency of the country in which the claim arose or the claimant now resides.

B. Voucher. Copies of paid vouchers shall be forwarded immediately to the Naval Regional Finance Center, Code 72, Building 28-2, Washington Navy Yard, Washington, D.C. 20374-0282 and to the Office of the Judge Advocate General of the Navy, 200 Stovall St., Alexandria, VA 22332-2400.

C. Accounting data. Foreign claims are paid under an open allotment with fund citation from NAVCOMPT Manual, Volume 2, Chapter 2, paragraph 201 under the title Judge Advocate General Defense Claims: appropriation symbol 1791804, subhead .122B, class 006, control 00013, authorization accounting activity 000179, transaction type 2D, cost code 00000999252A.

D. Release. A release shall be obtained from the claimant when payment of an award is accepted. The suggested form for the release from the JAG Manual is reproduced in the appendix to this chapter.

3409 **APPEAL AND RECONSIDERATION.** The claimant has no right to appeal the action of the Commission. The Commission can, however, reconsider its action upon the request of the claimant or on its own initiative, or at the direction of higher authority. The claimant's request should specify a legal or factual basis for any error alleged. If after reconsideration the Commission concludes its original recommendation was correct, it will affirm the recommendation, notify the claimant, and forward an informational memorandum to or via the appointing authority.

APPENDIX TO CHAPTER 34SETTLEMENT AGREEMENT

KNOW ALL MEN BY THESE PRESENTS, that the undersigned hereby agree(s) to accept the sum of _____ in full satisfaction and final settlement of any and all claims (I) (we) now have or may in the future have against the UNITED STATES OF AMERICA, or any of its agents or employees, arising out of

(I) (We) agree that upon receipt of the aforesaid sum, the UNITED STATES OF AMERICA, and its agents and employees, shall be forever discharged from any and all claims, demands, damages, actions, causes of action, or suits of any nature or kind whatsoever arising out of the aforesaid matter.

IN WITNESS WHEREOF, the undersigned (have) (has) signed these presents this ____ day of ____, 19__.

WITNESS:

COMMISSION REPORT CONTENTS CHECKLIST

- _____ Appointing order and any modifications
- _____ Claim document by the claimant containing notice of time, place, and nature of the incident and an estimate of the damage or claim
- _____ Claim signed by the claimant; if signed by agent, authority to act is shown
- _____ Investigative Report
- _____ Summaries of witnesses' testimony or signed statements by witnesses
- _____ Proposed settlement agreement and release when payment is recommended
- _____ Commission Memorandum which states:
 - _____ Dates of the proceedings
 - _____ Amount of the claim in foreign and U.S. currency, as of the official exchange rate on the date the claim was initially considered
 - _____ Brief summary of the essential facts:
 - _____ Date of incident; date claim filed
 - _____ Circumstances of incident; Nature and extent of injury or damage
 - _____ Basis for determining whether the claim is payable
 - _____ A summary of local laws, standards, customs
 - _____ Date of adjudication by the Commission
 - _____ Amount of any recommended award, stated in local and U.S. currency at the official exchange rate applicable on the adjudication date
 - _____ Statement of the recommendations of the Commission and an explanation of the basis

CHAPTER 35

COMMAND SPONSORSHIP

3501 **INTRODUCTION.** The area coordinator must grant entry approval and sponsorship for a dependent of either a military member or a civilian employee to accompany them overseas. Sponsorship gives the dependent certain protection under the SOFA and entitlement to use of the Navy Exchange, Commissary, EML flights, etc. Sponsored dependents are also entitled to transportation at government expense to and from the overseas location.

3502 **TYPICAL PROBLEMS.** Frequently the command will get requests to have the dependents returned to CONUS early. Many requests are made because of marital difficulty, the family has culture shock, the spouse can't find work, etc. Early return is intended as a last resort. In some cases, the command is able to judge that a situation can not be resolved or will likely recur. In such cases, commands may determine it better to send the dependents home than to spend inordinate amounts of administrative time on solutions most likely to be only temporary. All early return of dependents requests are processed through the Family Service Center. You generally will not become involved unless it is an involuntary return of dependents.

3503 **RELATED ISSUES.** Problems occasionally arise when the family returns to CONUS but the member continues to reside in government family quarters. SJAs should ensure adequate procedural checks are in place to prevent this. For example, some commands have established a reporting requirement for FSC to notify the Assistant Public Works officer when each early return of dependents is approved so that the Housing Office can check its records to ensure that government quarters are made available for eligible families and the military member is not holding over. In addition, where the member has abandoned the family in quarters and moved off base or has not resided with the family for 60 days, the family is no longer eligible for housing and must vacate the quarters.

3504 **SAMPLE DOCUMENTS.** The documents on the following pages are based on the efforts of the SJA, NAS Sigonella to cope with these and other challenges.

SAMPLE DOCUMENTS**MEMORANDUM**

From: Staff Judge Advocate, NAS Sigonella
To: Commanding Officer, NAS Sigonella
Via: Executive Officer

Subj: **COMMAND SPONSORSHIP**

Ref: (a) Status of Forces Agreement
(b) CINCUSNAVEUR Instruction 5711.7A

1. At Naval Air Station Sigonella, certain individuals are granted command sponsorship when they accompany the forces overseas in accordance with reference (a). Command sponsorship allows certain privileges for medical care, Navy Exchange, commissary, and other base privileges. Currently, no strict format exists on board NAS Sigonella to control command sponsorship privileges.

2. Reference (a) allows members of the forces and their dependents who accompany those forces to enjoy certain tax-free benefits. Such benefits include the importation of automobiles, household goods, and other goods for personal use, Italian Government tax and duty free. This privilege is granted only to those members of the force who are brought overseas to perform the mission of the U.S. Navy and their dependents who are granted command sponsorship. In the NAS Sigonella community, we have a number of deployed units. These deployed units frequently have dependents accompanying them. Normally, dependents of this nature are not allowed in other European country's U.S. Military exchanges, commissaries, or medical care facilities. Because of the nature of the mission performed here at Naval Air Station Sigonella, it is recommended that a privilege card unique to Naval Air Station Sigonella, be provided. This card, in conjunction with the current green I.D. card of the military members and the brown I.D. card of military dependents and U.S. civilian workers, would allow the individual access to the commissary, exchange, and other facilities on board the station. This would prevent those who are not accompanying the forces and have not been granted command sponsorship from abusing the facilities located herein.

3. At Naval Air Station Sigonella, we have a number of problems with dependents that have remained after the sponsor has departed the station. There is an unwritten understanding at NAS Sigonella, that dependents will be allowed to stay 60 days after the sponsor has departed the station. Under reference (a), dependents are allowed to stay only as long as the sponsor is present in the area. I recommend that any dependent who desires to stay beyond the sponsor's tour length be required to

submit a written request to the Commanding Officer, NAS, Sigonella. This must also include all tenant commands. Because the Commanding Officer, NAS Sigonella, is the area coordinator, he must grant the request to have the command sponsorship extended for a period of time, preferably not to exceed 60 days. Currently, guidelines exist to allow dependents to extend in a duty station for 60 days while awaiting quarters at Guantanamo Bay. Presently we have a number of dependents of military members, who have remained in Sigonella who are working as vendors in the Navy Exchange, or working for MWR, or recreational services or in some other capacity. These people, based just on the issuance of their I.D. card, are allowed to shop in the commissary and exchange. Under Italian law, if these people have remained in Italy for a period of 12 months after the sponsor has departed the station, they are considered ordinary resident in Italy and should not be allowed to work on board the station. Reference (a) does not envision having a large number of dependents remaining in Italy using tax-free goods and services provided by the U.S. Navy.

4. Under a provision granted by the United States Ambassador in 1980, retirees of U.S. military forces have been granted commissary exchange, and medical privileges on board military installations in Italy. This is unique in the European theater. No other country affords such privileges to retirees. For instance, in Spain, retirees are not allowed to shop on board the station. We have received reports of retirees who are apparently abusing their privileges in both the commissary and exchange. Such reports include a retiree going to the commissary and buying two or more carts full of groceries three times a week on a regular basis. Reportedly, this individual owns a commercial establishment in the Motta area.

5. The privilege card that I described above, if issued to naval members and dependents, would be similar to the privilege card that is issued in Rota, Spain. It would be unique to Italy, and Naval Air Station Sigonella. This privilege card would readily identify the individual as being allowed to shop in our facilities located here at Sigonella. It is not intended to unduly fetter those individuals who may be visiting the area. Such cards would allow the Navy Exchange and commissary personnel to readily identify those people who are allowed to shop at those facilities. It would also serve as a means for the Commanding Officer Naval Air Station Sigonella, to remove the shopping privileges of those who abuse them. Removal of privileges has been an issue at NAS for persons who have committed misconduct against the Navy Exchange and commissary facilities. Such misconduct has included the theft of thousands of dollars from the Navy Exchange, blackmarketing of Navy Exchange goods to local nationals, and providing commissary goods to personnel who are not entitled to commissary privileges. The card could be issued annually by Security Pass and I.D. to eligible personnel. If privileges are to be limited, the limitations can be over stamped on the card. The privilege card would change colors annually and would have the year stamped boldly on the front. A photograph on each card may also be desirable.

SAMPLE REQUEST FOR EARLY RETURN OF DEPENDENTS
INCIDENT TO UNUSUAL OR EMERGENCY CIRCUMSTANCES

From: (Sponsor's rate/grade, full name, USN, SSN)

To: Commanding Officer, U. S. Naval Air Station, Sigonella

Via: (1) Director, Navy Family Service Center

(2) (Appropriate department head or tenant command CO/OIC)

Subj: REQUEST FOR EARLY RETURN OF DEPENDENTS INCIDENT TO
UNUSUAL OR EMERGENCY CIRCUMSTANCES

Ref: (a) Joint Federal Travel Regulations para U5240-D2 (specify
subparagraph letter)

(b) Joint Federal Travel Regulations para U5370-D

(c) Joint Federal Travel Regulations para U5410-B

Encl: (1) Appropriate documents

1. Per the references and for the reasons stated in the enclosure, I request early return transportation for my command sponsored dependents presently residing at (street address and city/town in Sicily) to (city and state in CONUS/Hawaii/Alaska/Puerto Rico/other U.S. territory or possession):

a. (Full name/relationship/age)

b. (Full name/relationship/age)

2. To enable my dependent(s) to establish a residence in the area cited in paragraph (1) above, I request that shipment of personal property [and POV] be authorized per the references.

3. I make this request with full knowledge of applicable regulations and understanding that I do not expect to be transferred from my present duty station until [projected rotation date]. I also understand that the return of my dependents to the overseas area is subject to approval of the Secretary of the Navy, or designated representatives, and is granted only under unusual circumstances. I further understand that should my dependents desire to rejoin me at this duty station at some future time, they would not be entitled to command sponsorship or travel at government expense.

(Signature of sponsor)

Copy to: Service record personnel file

From: Commanding Officer, U.S. Naval Air Station, Sigonella
To:

Subj: TRANSPORTATION OF DEPENDENTS INCIDENT TO UNUSUAL OR
EMERGENCY CIRCUMSTANCES

Ref: (a) Joint Federal Travel Regulations para U5240-D2 (specify
subparagraph letter)
(b) Joint Federal Travel Regulations para U5370-D
(c) Joint Federal Travel Regulations para U5410-B

Encl: (1) Member's letter
(2) Substantiating documentation

1. In response to enclosure (1), early return of dependents is hereby approved for members dependents listed below. Available evidence in support of subject request (enclosure (2)) has been reviewed and it is found that due to circumstances described by enclosure (1), transportation of the following dependents and household goods is authorized per references (a) and (b) at government expense to: [Must be in CONUS, Alaska, Hawaii, Puerto Rico, or other U.S. territory or possession].

DEPENDENT	RELATIONSHIP	AGE
-----------	--------------	-----

DEPENDENT	RELATIONSHIP	AGE
-----------	--------------	-----

3. Shipment of members POV, to an authorized port of entry in CONUS, is also authorized in accordance with reference (c). In addition, member is required to vacate government housing quarters effective on the dependents' departure.

4. Member is to be reminded that transportation is authorized in consideration of unusual or emergency personal reasons and not to accrue additional entitlement or benefits; therefore, caution should be exercised in the execution of orders. Orders should be used in a timely manner and under no circumstances following receipt of permanent change of station orders. Member is encouraged to become familiar with the provisions contained in Joint Federal Travel Regulations and Navy Travel Instructions concerning dependent and personal property transportation entitlements under subsequent PCS orders.

5. In view of the above, _____ is requested to issue appropriate written orders to effect transportation of dependents as indicated in paragraph 1 above and to make appropriate Page 13 entries.

E. D. PLATT

Copy to:

COMNAVMILPERSCOM (NMPC 07)

Member

SJA

Family Service Center

Comptroller

Civilian Personnel Department (if applicable)

Housing Office (if applicable)

FIRST ENDORSEMENT ON OIC, Navy Resale Activity ltr of 12 Sep CY

From: Staff Judge Advocate
To: Commanding Officer
Via: (1) Director, Navy Family Service Center
(2) Executive Officer

Subj: SPONSORSHIP OF MR. LARRY FINE

Ref: (a) NATO Status of Forces Agreement
(b) Bilateral Infrastructure Agreement Implementing Article
III of the North Atlantic Treaty
(c) OPNAVINST 1300.13

1. Forwarded recommending denial.
2. Article III of reference (a) and Article VI of reference (b) preclude the Navy from allowing family members of military or civilian sponsors to remain in Italy after the sponsor has transferred. Under the provisions of reference (a), the Navy must notify the Italian government that the child will be remaining in Italy without U.S. military sponsorship. His continued presence here will be at the pleasure of the Italian government. The provisions of references (a) and (b) are designed to prevent U.S. personnel from remaining in Italy and establishing residences without going through the regular channels of immigration. The Provisions apply to the U.S. as a sending state as well as a receiving state.
3. When Mr. Fine detaches from the NEX, his status as a member of the civilian component will terminate. Concurrently, the status of his family members as dependents of a member of the civilian component will terminate. The impact of this termination is that the individuals involved will forfeit any entitlement to protections or privileges granted under the NATO SOFA. Specifically as it relates to this case, the son would not be entitled to Navy Exchange or commissary privileges, nor would he be entitled to any of the protections afforded a recognized individual involved with the Italian criminal justice system.
4. Although the Navy Resale Activity has offered to sponsor Mr. Fine's son, Moe, that offer is not within the purview of reference (c), the instruction dealing with command sponsorship. Reference (c) recognizes neither the requested sponsorship by a command nor the sponsorship by a family friend, LTJG Shemp Howard. Without this command sponsorship, government housing would not be available.

5. For Moe to remain in Italy to finish the school year, the family would need to obtain a tourist passport and visa as well as a sojourn permit. The family would not be entitled to process the sojourn permit through this office. If arrangements can be made for the care of the child by someone in the Sigonella community, and the legal documentation could be obtained, the child could attend the school as a tuition student. The child's privileges would be limited, however, to attending the school. Since the family sponsor would no longer be employed by the Navy Exchange here, the child might not even be entitled to medical care at the Branch Hospital, even on a paying basis.

6. In summary, pertinent international agreements preclude the Navy from unilaterally allowing the individual to remain beyond the time of his father's detachment. If the family can obtain the required legal documentation, the command would merely have to notify the Italian authorities of the son's intention to remain in Italy. The final decision would be made by the Italian government. As previously noted in other similar cases, I recommend that we not unilaterally authorize the sponsorship extension for this young man. I recognize that this will create a hardship for the family, but I believe that our hands are tied by the NATO SOFA.

Very respectfully,

RICK E. STRONGARM

CHAPTER 36

CUSTOMS

3601 REFERENCES

- A. U.S. Customs laws, 19 U.S.C.; regulations, 19 C.F.R.
- B. DoD Regulation 5030.49R
- C. SECNAVINST 5840.6
- D. OPNAVINST 5840.2 [Navy inspection procedures]
- E. Article 0860, U.S. Navy Regulations, 1990
- F. OPNAVINST 3120.32B, paragraph 510.14

3602 **INTRODUCTION.** Awareness of local customs regulations can ensure a smooth start to a successful port call. SJAs should review chapter 11 of the JAG Manual for a comprehensive discussion of customs regulations, drafted by an officer who is a senior official in the Customs Service when not wearing his Navy Reserve uniform. In addition, U.S. Consulates and military shore detachment teams will provide U.S. ships and aircraft with local customs information prior to arrival. The rules outlined in this chapter are under the direct control of the Commissioner of Customs and may be changed without legislative action. Consequently, SJAs should check with the local District Director of Customs or U.S. Consulate for information on recent changes. Locations and telephone numbers of Customs District Directors are listed in A-11-a of the JAG Manual.

3603 **U.S. CUSTOMS SERVICE.** The U.S. Customs Service is charged with enforcing laws relating to the importation and exportation of merchandise and all Federal laws at U.S. borders and ports. The "customs territory of the United States" includes the 50 States, the District of Columbia, and Puerto Rico. The other territories and possessions of the United States have their own local customs laws which vary from territory to territory. Customs law enforcement jurisdiction falls into four main categories: customs enforcement [Title 19, U.S. Code]; drug enforcement [Controlled Substances Import and Export Act]; export restriction enforcement [Arms Export Control Act and the Export Administration Act of 1979];

and currency law enforcement [the Bank Secrecy Act and the Money Laundering Control Act of 1986]. Customs officers have broad search and investigative powers. Customs officers may search persons, conveyances, baggage, cargo, and merchandise entering or leaving the U.S. without a warrant and without suspicion of criminality. Military personnel, vessels, aircraft, and other vehicles are not exempt from such searches. Also, Customs officers are authorized to stop vehicles and board vessels and aircraft without a warrant to perform customs inquiries and border searches. Any merchandise or vehicle involved in a Customs violation is generally subject to civil forfeiture and may be seized by Customs officers without a warrant. Customs offenses by military personnel may be prosecuted either in Federal court or at a court-martial.

3604 **SJA ROLE.** The SJA can assist commanding officers and aircraft commanders in facilitating the clearance of customs by their vessels or aircraft. In particular, advice on duty exemptions and import and export restrictions can assist in preparing declarations and avoiding infractions. SJAs can also help commanders educate crewmembers about customs rules, the existing exemptions, and the possible consequences of abuses, such as forfeiture of the goods involved, penalties, prosecution in Federal court or by court-martial, and possible loss of the privileges for all.

3605 **ARRIVAL AND ENTRY OF VESSELS.** Article 0860 of U.S. Navy Regulations, 1990, requires the commanding officer of a naval ship, or the senior officer of ships in company, returning to the customs territory of the United States from a foreign country, to report arrival to the Customs District Director for the first port of entry. Commanding officers are required to facilitate U.S. customs and immigration inspections of the vessel, and must satisfy themselves that proper immigration clearance is obtained for any military or civilian passengers. Notice must be given to military or civilian port authorities of the presence of passengers prior to arrival in port. The commanding officer is also responsible for distributing customs declaration forms under paragraph 510.14 of OPNAVINST 3120.32B and completing military customs inspection of the vessel before arrival under DoD Regulation 5030.49R of 1 September 1980 and OPNAVINST 5840.2. Customs regulations normally impose no additional notification requirements for naval vessels. If, however, a naval vessel is carrying cargo, the commanding officer must file a Cargo Declaration, Customs Form 1302, with the District Director of Customs within 48 hours of arrival (defined as coming to rest, whether at anchor or at a dock, in any harbor within the customs territory of the United States). If the vessel is transporting anything other than United States property and passengers traveling on official business of the United States, it must make entry in the same manner as a civilian merchant vessel within 48 hours of arrival. Contact the District Director of Customs for procedures.

3606 ARRIVAL AND ENTRY OF AIRCRAFT. Customs regulations require all aircraft entering the customs territory of the United States to give advance notice of arrival to the Customs District Director at or nearest the place of first landing. The aircraft commander is responsible for making notification by radio, telephone, or other direct means; or through FAA flight notification procedures. Notice must include: (1) type of aircraft and registration number; (2) name of the aircraft commander; (3) place of last foreign departure; (4) place of intended landing; (5) number of alien passengers; (6) number of citizen passengers; and (7) estimated time of arrival. In addition, the aircraft commander is responsible under military regulations for notice, distribution of declarations, and inspections as listed above for vessels. Military aircraft are normally exempt from Customs entry, but, like vessels, must make entry if carrying anything other than United States property and passengers traveling on official business of the United States. If required, entry must be made upon first landing at an airport in the customs territory of the United States.

3607 ARTICLES ACQUIRED BY RETURNING RESIDENTS. Residents, as defined in JAG Manual § 1105, are entitled to an exemption from duty and internal revenue tax on articles for personal or household use that were acquired abroad merely as an incident of a journey to an area outside the U.S. customs territory for a period of at least 48 hours (measured exactly). This exemption does not apply to articles intended for sale or acquired for the account of another person, with or without compensation for the service rendered, but may include articles intended for use as bona fide gifts. See JAG Manual § 1106 for special rules pertaining to Mexico and the U.S. Virgin Islands. Rules relating to nonresidents are discussed in JAG Manual § 1107.

A. Value Limitations. The aggregate fair retail value in the country of acquisition of such articles shall not exceed \$400.00, or in the case of a resident arriving directly or indirectly from American Samoa, Guam, or the U.S. Virgin Islands, \$800.00 of which not more than \$400.00 shall have been acquired elsewhere than American Samoa, Guam, or the U.S. Virgin Islands. The articles representing the \$400.00 acquired elsewhere must accompany the passenger. If the resident claimed an exemption within 30 days immediately preceding this arrival (excluding the day of arrival), only \$25.00 worth of articles for personal or household use will be exempted.

B. Alcoholic Beverages. Customs will not release alcoholic beverages for use in any State in violation of its laws. Generally, residents over 21 may include alcoholic beverages in their exemption, subject to the following limitations:

1. One liter in the case of an individual who does not arrive directly or indirectly from American Samoa, Guam, or the U.S. Virgin Islands.

2. Four liters in the case of an individual who arrives directly or indirectly from American Samoa, Guam, or the U.S. Virgin Islands not more than one liter of which shall have been acquired elsewhere than American Samoa, Guam, or the U.S. Virgin Islands.

C. Cigars and Cigarettes. Not more than 200 cigarettes and 100 cigars may be included in the exemption. Subject to this limit, U.S. domestic cigars and cigarettes that were exported under internal revenue laws and regulations without the payment of tax may be included in the exemption. See also JAG Manual § 1117.

D. Flat Duty Rate. Articles valued at up to \$1,000.00 in excess of the exemption are subject to a 10 percent rate of duty based on the fair retail value in the country of acquisition when they accompany the returning resident. The flat rate is five percent for articles acquired in American Samoa, Guam, or the U.S. Virgin Islands. This five percent rate applies whether or not the articles accompany the resident.

E. Family Grouping. When members of a family residing in one household travel together, their individual exemptions may be grouped and allowed without regard to which member is the owner of the articles (except alcoholic beverages owners must be 21). The flat rate of duty on articles valued at up to \$1,000.00 in excess of the exemption may also be grouped.

3608 **HOUSEHOLD GOODS SHIPMENTS.** This exemption is available to any person in the service of the United States who returns to the United States upon the termination of assignment to extended duty at a post or station outside the customs territory of the United States, or to returning members of his family who have resided with the member at such post or station, or to any person evacuated to the United States under Government orders or instructions, whether in the service of the United States or not. Employees of the American Red Cross, employees of U.S. Government contractors and military banks, and persons in a comparable category are NOT considered in the service of the U.S. Government even though they are on duty with the Navy in an overseas area.

A. Extended Duty Requirement. Generally, the extended duty requirement will be met by members: returning PCS; returning at the end of a tour of duty of at least 140 days duration; returning from continuous service on a U.S. naval vessel which departed from the United States on an intended deployment of 120 days or more outside the customs territory of the United States (regardless of actual

deployment duration). By contrast, a member returning from overseas before the end of a tour while on leave or TAD is not entitled to the exemption.

B. Articles Exempted. This exemption from duty and internal revenue tax applies to personal and household effects of the eligible individuals. It does not apply to articles intended for sale, or imported for the account of any person not entitled to the exemption. Although this does not prohibit the subsequent use of such articles as bona fide gifts, any reimbursement or compensation, even though there is no profit to the importer, will disqualify an article as a bona fide gift.

C. Possession Abroad Requirement. Articles not in the possession of the person claiming the exemption while abroad cannot be considered personal and household effects within the meaning of the Customs regulations. No particular period of use is abroad required but the person claiming the exemption must have, at a minimum, been in such proximity to the specific property that immediate control or possession could have occurred at or after the purchase. This requirement will not be satisfied by the possession of the purchaser's agent or direct shipment to the United States.

D. Motor Vehicles. Military and civilian employees of the U.S. Government returning at the end of an assignment to extended duty outside the United States may include a vehicle among their duty-free personal and household effects.

1. Generally, a motor vehicle manufactured on or after 1 January 1968 will not be permitted entry into the United States unless it conforms to applicable safety standards in effect at the time the vehicle was manufactured. Additionally, imported automobiles must comply with Federal pollution control standards contained in Environmental Protection Agency regulations. The former one-time exemption for 5-year-old vehicles was discontinued.

2. Compliance with applicable safety standards and pollution control standards must be established at the time of entry with proper certificates of compliance. Vehicles manufactured to U.S. safety and emissions standards will have plates so certifying affixed by the manufacturer. Vehicles which were not manufactured to U.S. safety standards must be entered under bond. Information on safety standards may be requested from: U.S. Department of Transportation, National Highway Traffic Safety Administration, Office of Vehicle Safety Compliance (NEF-32), 400 Seventh Street, SW, Washington, D.C. 20590.

3. Vehicles which were not manufactured to U.S. pollution control standards may be imported only through an importer licensed by the Environmental Protection Agency. Lists of current certificate holders may be obtained from: Investigation/Imports Section (EN-304F), U.S. EPA, Washington, D.C. 20460. Post-

1975 vehicles previously exported from the U.S. must have their catalytic converters and/or oxygen sensors replaced upon entry. A bond may be required for the completion of this procedure.

E. Pleasure Boats. A pleasure boat may be included in the personal and household goods exemption. Foreign manufactured non-commercial pleasure boats entering the United States are subject to the Federal Boat Safety Act of 1971 and Coast Guard Safety Regulations. Evidence of compliance required for entry generally includes a certificate of compliance affixed to the vessel by the manufacturer or importer. Vessels may enter without certification if the member files a declaration that the boat: was manufactured before the effective date of the safety standards; or has been altered to comply with the standards (with appropriate certification). The boat will also be allowed to enter if it has been previously exempted from the standards by the Coast Guard or the member certifies that the boat will be brought into compliance within 90 days following entry and that the boat will neither be sold nor used prior to compliance (bond required).

3609 **SPECIAL EXEMPTION FOR SEA-STORE CIGARETTES.** When a U.S. naval vessel has proceeded beyond the territorial limits of the United States, sea-store cigarettes may be sold to members. The Commissioner of customs allows an administrative exemption from duty and any internal revenue tax limited quantities of sea-store cigarettes when the vessel does not visit a foreign port or other port outside the customs territory of the United States on such a trip, and if the requirements relating to "extended duty" are not met. Under these circumstances, two opened packs of sea-store cigarettes may be taken ashore within the Customs territory of the United States by a crewmember at any one time for his own personal use without duty or internal revenue tax liability and without customs entry. The total quantity of such cigarettes brought ashore by any member under this exemption after any voyage beyond the territorial limits of the United States shall not exceed 15 packs. The commanding officer is responsible for enforcement of these rules. In discharging that responsibility, the commander is free to impose additional or more restrictive regulations.

3610 **GIFTS SENT FROM FOREIGN COUNTRIES.** Any person in a foreign country is eligible for this exemption. The articles must be bona fide gifts. The total value of all exempt gift shipments received in one day by any donee may not exceed \$50.00 or \$100.00 for gifts from American Samoa, Guam, or the U.S. Virgin Islands. "Value" is the aggregate fair retail value in the country of shipment. Alcoholic beverages and tobacco products are not included in this exemption from duty, nor are perfumes containing alcohol if the shipment is valued at more than \$5.00. Gifts may be sent in any manner other than on the person or in accompanied

or unaccompanied baggage of the donor or donee. Detailed mailing procedures are in OPNAVINST 5112.6 and U.S. Navy Postal Instructions, chap. 7, sec. 4.

3611 PROHIBITED IMPORT ARTICLES. Certain merchandise is absolutely prohibited from entry into the United States. Prohibitions change frequently and SJAs should contact the nearest U.S. Consulate or Customs District Director for a current list. Typically, prohibited articles include: lottery tickets; South African and Soviet gold coins; illegal drugs and paraphernalia; obscene material; printed matter advocating treason or insurrection against the United States; counterfeit currency and stamps; unlicensed weapons; and certain plants and plant products.

3612 RESTRICTED IMPORT ARTICLES. Certain merchandise, notably food products, may enter the United States only if it meets the requirements of U.S. laws and regulations. Many of these laws and regulations are administered by agencies other than the Customs Service, although the Customs Service conducts most border enforcement activities. As with prohibited articles, the list of restricted articles changes frequently, and guidance in specific cases should be sought from a U.S. Consulate, Customs District Director, or from the Federal agency which administers the restriction. See JAG Manual § 1113 for rules pertaining to importation of embargoed articles.

A. Pets. The importation of birds, cats, dogs, monkeys, and turtles is subject to the requirements of the U.S. Public Health Service, Center for Disease Control, Quarantine Division, Atlanta, GA 30333, and the Veterinary Service of the Animal and Plant Health Inspection Service, Department of Agriculture, Hyattsville, MD 20732. Pets taken out of the United States and returned are subject to the same requirements as those initially entering.

B. Knock-offs. The importation of merchandise of foreign manufacture is prohibited if it bears a mark or name that copies or simulates a trademark or trade name recorded with the Treasury Department. Persons arriving in the U.S. with a trade-marked article are allowed an exemption, usually of one article of a type bearing a protected trademark, as long as the article is for personal use and is not for resale. This exemption would apply to an article bearing a counterfeit or confusingly similar trademark as well as an article bearing a genuine trademark. If sold within 1 year of importation, the exempted article or its value is subject to forfeiture. This exemption may be used only once each 30 days by the same person for the same type of merchandise. Greater quantities of trademarked goods may be imported with the written consent of the owner of the protected trademark or trade name. The consent does not apply to articles mailed to the United States nor to

articles imported for resale. A copy of the list of protected items may be obtained from any U.S. Customs office; and

C. Endangered Species Protection. The importation of these items, e.g., scrimshaw, or ivory carvings, is prohibited, with certain exceptions. Importation typically requires Department of Commerce permit, certification, or registration. For further information, contact the U.S. Fish and Wildlife Service, P.O. Box 28006, Washington, D.C. 20005.

3613 IMPORTING PRIVATELY OWNED FIREARMS AND AMMUNITION. The Gun Control Act of 1968 controls the transportation, shipment, receipt, and importation of privately owned firearms and ammunition. The Director, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, is responsible for the administration and enforcement of the Act. The Customs Service enforces the import restrictions through clearance of imported firearms and ammunition. Generally, military members may import not more than three nonautomatic long guns (rifles or shotguns) and 1,000 rounds of ammunition therefor, without presentation of an approved firearm import permit to U.S. Customs. Surplus military firearms of any description are prohibited entry. Firearms and ammunition previously taken out of and returned to the United States by the same person may be released upon presentation to U.S. Customs of adequate proof of prior possession, i.e., bill of sale, household goods inventory showing serial numbers, or prior registration with Customs on Form 4455 or Form 4457. Chapter 10 of DoD Regulation 5030.49R of 1 September 1980 contains detailed instructions implementing the provisions of the Gun Control Act of 1968 and related laws and regulations as they apply to the importation of firearms and ammunition by DOD personnel. The chapter, however, does not apply to the control, registration, or shipment of war trophy firearms, which is governed by OPNAVINST 3460.7A and MCO 5800.6A.

3614 CURRENCY REPORTING REGULATIONS. The amount of money or monetary instruments which may be brought into or taken out of the United States is not limited. If, however, a person transports, attempts to transport, or causes to be transported, more than \$10,000.00 in monetary instruments on any occasion into or out of the United States, a report (Customs Form 4790) must be filed with U.S. Customs.

3615 FOREIGN CUSTOMS. A nation may tax persons and activities within its territory. For visiting forces, the host nation normally will waive a portion of this power. The applicable status of forces agreement (SOFA) usually specifies what customs provisions will apply.

A. NATO Example. Under the NATO SOFA, for example, the "force" may import its equipment and reasonable quantities of provisions, supplies, and other goods for its exclusive use free of duty. Official documents under seal are not subject to customs inspections and official vehicles are not subject to road use taxes. Petroleum, oils, and lubricants for use in official vehicles and equipment of the force may likewise be imported duty free. The visiting force may also operate exchanges and commissaries, fleet post offices, banking facilities, newspapers (such as Stars and Stripes), and morale, welfare, and recreation activities. SOFA's with many other countries, such as Japan, Korea, and the Philippines, have similar provisions. There are variations, however, and the applicable SOFA must be reviewed in each case.

B. Individual Responsibility. In their individual capacities, members of the force and the civilian component and dependents are generally subject to the customs laws and regulations of the host nation. The NATO SOFA provides some special privileges, however, such as the ability to import private vehicles, household goods, and personal effects duty free, and to export them at the end of tour. Although there may be exceptions in some countries, such privileges usually do not extend to retired personnel and their dependents. Goods imported duty free may not be transferred by sale or gift to persons not authorized duty-free privileges, except as the host country may permit. In most countries, the unauthorized transfer of duty-free goods is a serious criminal offense.

SAMPLE SHIP/AIRCRAFT CUSTOMS INSPECTION PROCEDURES

1. Establish Inspection team(s) of responsible, mature officers and petty officers designated in writing by the commanding officer. Team members will be available to customs officials for discussion of inspection routine to be used prior to arrival at port of entry.
2. Conduct thorough inspections of all ship and aircraft spaces, cargo, personnel and lockers. Ensure that provision is made for precluding movement of contraband from space to space to avoid detection. This Inspection is to take place between the time the unit departs its last foreign port and the arrival at the port of entry. Insofar as possible, the inspections will be carried out on an unannounced basis. The drug interdiction effort, although occurring in the final inspection enroute to CONUS, is envisioned as a continuing process lasting throughout the deployment.
3. In addition to the inspection in paragraph 2 above, the ship or aircraft commander will conduct at least one unannounced inspection of spaces randomly selected at the discretion of the commanding officer.
4. All personnel aboard the ship or aircraft will prepare customs declaration forms. These forms will be checked against the crew list by a designated officer or CPO to ensure that all have submitted a declaration. The declarations will be delivered to customs personnel upon boarding unless pre-arrival delivery arrangements have been made. The items declared will be available for customs inspection upon demand. Declarations will be segregated into four categories as follows and will be under a cover letter.
 - a. Declarations from military personnel who have served on board the ship continuously since its last departure from the customs territory of the United States.
 - b. Declarations from embarked military personnel who, even though they were not serving on board the ship when it last departed the customs territory of the United States, have been outside the customs territory of the United States for 140 or more continuous days.
 - c. Declarations from military personnel who do not fall into either of the above two categories.
 - d. Declarations from civilians (less dependents whose military sponsor has prepared a family declaration).

5. The commanding officers of ships returning from outside the customs territory of the United States shall ensure that all mail, except letter mail, is dispatched in pouches or sacks labeled "Supposed Liable to Customs." Letter mail suspected of containing merchandise or contraband shall be enclosed in official envelopes and addressed to the Administrative Officer, U.S. Customs Mail Division at either 1675 7th Street, Oakland, CA 94615; 404 South Lander Street, Seattle, WA 98134; or 201 Varick Street, New York, NY 10014, as appropriate.
6. Commanding officers of ships or aircraft will prepare a written declaration certifying that they have completed the required inspection and that, to the best of their knowledge, the ship is free of drugs or other contraband. They will present this document to the boarding customs official.
7. Adequate working space will be made available for customs officials on board.
8. For those ships having the capability, customs declaration forms may be flown to the port of entry in advance of arrival for delivery to customs officials if prior arrangements have been made.
9. Ships or aircraft having classified equipment or cargo which customs personnel wish to inspect, will provide an officer or petty officer to do the actual examination in the presence of a customs official.
10. There is no provision under United States law for the official collection of duties or taxes until the merchandise has been imported. Accordingly, military personnel will not assess or collect any taxes at any time, either in the United States or overseas. If duties are due, a U.S. Customs Officer will compute the amount of duty to be paid based on the customs declarations when they are received either on board by U.S. Customs Officials or at the appropriate U.S. Customs Office. This policy, however, shall not be construed to bar the development of procedures designed to calculate potential duties and to have personnel voluntarily set aside the amount of the potential duty.
11. In all instances where an individual is suspected of having committed a customs violation, he will be advised of his rights under the provisions of Article 31, UCMJ (or in the case of a civilian, advised of his rights under the 5th Amendment of the Constitution) and of his right to counsel before questioning.
12. The commanding officer or aircraft commander should take every opportunity to explain the inspection procedures and the necessity for their thorough and conscientious accomplishment. It should be explained that the self-inspection procedure results in less inconvenience to the crew and in faster debarkation upon arrival at the port where dependents are waiting.

UNITED STATES CUSTOMS CERTIFICATE

(USS _____)

(USN FLIGHT # _____)

PORT OF ENTRY _____

This is to certify that I, _____ Commanding Officer/Aircraft Commander, (USS _____), (USN FLIGHT * _____) have caused to be conducted a complete and through inspection of this ship/aircraft and all personnel on board and that, to the best of my knowledge and belief, the same are free of any drugs or other contraband.

Date: _____

(Signature)

Commanding Officer/Aircraft Commander

UNITED STATES CUSTOMS DECLARATIONUSS _____
PORT OF ENTRY _____

Attached hereto are DD Forms 1854, Accompanied Baggage Declaration, prepared by all personnel on board this ship, listing all articles acquired by them overseas, which lists are correct to the best of my knowledge and belief.

Date: _____

(Signature)

(Grade)

Commanding Officer

CHAPTER 37**IMMIGRATION AND NATURALIZATION****3701 REFERENCES**

- A. Immigration and Nationality Act, 8 U.S.C. §§ 1101-1557, as amended most recently by:
 - 1. Immigration Reform and Control Act of 1986, Pub. L. 99-607, 100 Stat. 3359 (1986).
 - 2. Immigration Marriage Fraud Act of 1986, Pub. L. 99-639, 100 Stat. 3537 (1986).
 - 3. Immigration and Nationality Act Amendments of 1986, Pub. L. 99-653, 100 Stat. 3655 (1986).
 - 4. Immigration and Nationality Act of 1990
- B. 8 C.F.R. Chapter 1 [INS regulations]
- C. 22 C.F.R. Parts 41, 42 [State Dep't visa regulations]
- D. DoJ "Guide to Immigration Benefits," Pub. No. M-210 (Rev. 1982).
- E. JAG Manual § 1008

3702 INTRODUCTION. This chapter provides an overview of the issues the SJA may encounter in the everchanging field of immigration and naturalization law. Comprehensive treatment of this broad subject is beyond the scope of this Deskbook. For detailed information and advice, contact the nearest Immigration and Naturalization Office stateside; the nearest U.S. Consulate overseas; or HQMC (JAL), NMPC-071, or OJAG.

3703 CITIZENSHIP BY BIRTH

A. Domestic Births. The general rule is that everyone born in the U.S. is a U.S. Citizen. The 14th Amendment; 8 U.S.C. § 1401(a). An alien who has been a permanent resident for five years is eligible for naturalization if otherwise qualified. 8 U.S.C. § 1427(a).

B. Births abroad. Persons born abroad to parents both of whom are citizens are U.S. citizens so long as one of the parents resided in the U.S. anytime prior to the child's birth. 8 U.S.C. § 1401(a). Persons born on or after November 14, 1986 abroad to one citizen and one alien parent are U.S. citizens if the citizen parent has been physically present in the U.S. for a total of five years, at least two of which were after age 14. 8 U.S.C. § 1401(g)]. The parent's service in the Armed Forces overseas or time spent overseas as a dependent of a soldier member counts toward this "physical presence" requirement. Children born out of wedlock to a citizen mother are granted citizenship if the mother at any time before the child's birth lived in the U.S. for a continuous 1-year period. 8 U.S.C. § 1409(c). Children born out of wedlock to a citizen father are granted citizenship as of birth if: the blood relationship is established by clear and convincing evidence; the father states in writing that he will provide financial support until the child is 18; and, before the child reaches 18, the child is legitimated or paternity is formally acknowledged or judicially established. 8 U.S.C. § 1409(a).

C. Births Aboard Vessels and Aircraft. A person born on a foreign vessel in U.S. territorial waters or in a port of the United States acquires U.S. citizenship at birth. Birth of a child to alien parents onboard a U.S. vessel or aircraft outside of our territorial waters does not confer U.S. citizenship.

D. Dependents Born Overseas. Members should establish the U.S. citizenship of their children born overseas as soon as possible. A certificate of birth issued by a military hospital is not proof of U.S. citizenship. The document that is proof is Form FS-240, "Report of Birth Abroad of a Citizen of the United States of America." This form is prepared by the member, accepted and sworn to at your personnel or other appropriate office and sent for approval to the U.S. embassy or consulate. A consular officer examines the information on the form and accompanying documents to determine if the child acquired U.S. citizenship at birth.

1. An approved Form FS-240 is recognized by U.S. law as primary evidence of U.S. citizenship and can be used to obtain a passport, to enter school and for most other purposes where a birth certificate is needed. A permanent record of the child's approved Form FS-240 will be placed in the Department of State's Office of Passport Services in Washington, D.C.

2. To register the overseas birth of a U.S. citizen child, the member will need to bring the following to the personnel or other designated office:

- a. The child's local birth certificate (from the military hospital or from local authorities);

- b. primary evidence of the U.S. parent's citizenship (a valid U.S. passport, naturalization certificate or certified copy of a U.S. birth certificate). Note: If both parents are U.S. citizens, you must submit proof of citizenship for both parents;
- c. a certified copy of the marriage certificate;
- d. certified copies of divorce decrees or death certificates from any earlier marriages; and
- e. The fee, currently \$13.

3. Members' children need a U.S. passport to live overseas. Moreover, the child cannot enter the United States without a passport. To save time, the member should apply for the child's passport when the birth is reported by including:

- a. A completed passport application, Form DSP-11;
- b. two passport photos of the child; and
- c. the fee, currently \$27 [If other dependents are on the member's travel orders, the new child's passport will be a no-fee passport and instead of the fee, include a completed Form DD-1056, "Authorization to Apply for a 'No-fee' Passport and-or Request for Visa."

3704 **ACQUIRING CITIZENSHIP.** The Department of the Navy has no authority to grant alien members either citizenship or lawful permanent resident status. An alien who has served in the U.S. Armed Forces does not automatically become a citizen. For those who have not served during the designated wartime periods, discussed below, applying for U.S. citizenship is normally a two-step process: acquiring lawful permanent resident status and naturalization.

3705 **ACQUIRING LAWFUL PERMANENT RESIDENT (LPR) STATUS**

A. Obtaining a Visa. To become an LPR, an alien must first obtain an immigrant visa. This permits the alien to enter the United States and to remain for a specified period of time. The visa usually takes the form of an imprinted stamp in a passport.

1. State Department consular offices overseas issue visas to aliens wishing to enter the United States. A visa does not necessarily guarantee entry into the United States. It permits travel to U.S. entry points. U.S. immigration officers at the border determine whether holders of visas are properly documented and otherwise eligible to enter the U.S. and for how long. Aliens who are U.S. servicemembers do not need visas to enter the United States; they need only show their military identification and papers.

2. The spouse, child under age 21, or parent of an adult U.S. citizen is immediately eligible for an immigrant visa and LPR status. Visas for other immigrants are subject to quota limitations. These quotas are distributed in categories known as preferences. For some countries, the waiting list for a quota may be extremely long.

B. Adjustment of Status. If an alien in the United States becomes eligible for permanent residency (for example, by marriage to a U.S. citizen), he must adjust his status from nonimmigrant to immigrant. This normally requires travelling back to the country of origin to file a petition at the U.S. Consulate. An exception may be made for aliens who are U.S. servicemembers. If the commanding officer cannot spare the member for the travel overseas (or if other compelling reasons exist for a travel exception), contact OJAG for assistance.

1. To make an adjustment of status, the alien files a petition (Form I-130) and adjustment application (Form I-485) at the INS district office with jurisdiction over the alien's U.S. residence. Among other details, the application provides information on past residences, associations, political beliefs, and grounds for excludability. The FBI conducts a background check which typically takes 60 days, followed by an interview at the INS office, at which permanent residence status is granted or denied.

2. The adjustment procedure not available if alien was not lawfully admitted to the U.S. or if the marriage occurred while the alien was undergoing deportation or exclusion action. Alien must apply for permission to travel abroad while the application is pending; failure to do so may result in exclusion from the U.S. upon attempted return. The normal prohibition on "adjustment" if the alien illegally accepted employment in the U.S. does not apply to spouses of citizens or certain preference category applicants.

C. Alien Residing Overseas. Special "nonimmigrant" visa procedures exist for aliens seeking to travel to the U.S. to marry a citizen. 8 U.S.C. §§ 1101(a)(15)(K), 1184(d); 8 C.F.R. § 214.2(k). The citizen to be married files a petition (Form I-129F) for the visa at the INS district office for the U.S. residence. The petition must show that the parties had met in person within 2 years of filing the

petition and that they have the intent and legal capacity to marry within 90 days. Once approved, the petition is sent to the consulate for the area where the alien lives. There, the matter is handled in substantially the same manner as an application for an immigrant visa. Upon approval, a K-1 visa is issued for the intended alien spouse. Separate K-2 visas must be obtained for each of the alien's children who will go to the U.S. The visa is valid for 4 months after issuance. The marriage must occur within 90 days of the alien's admission to the U.S. After the marriage, the alien applies for an adjustment of status. The processing time is about the same as for an immigrant visa; however, if the citizen and alien both reside in a foreign country, the immigrant visa is usually faster.

3706 NATURALIZATION. Naturalization can only occur upon the candidate appearing before a proper INS official and filing a preliminary application while in the U.S.; naturalization cannot be accomplished without actually travelling to the U.S. even if residency requirements are waivable.

A. General Requirements for Adults. After acquiring LPR status, an applicant must reside in the United States continuously for 5 years before filing a petition for naturalization. The applicant must have been physically present in the U.S. for at least one-half the residence period. Residency for the last 6 months must be in the state where the petition is to be filed. Continuous "residence" from the date of filing until receipt of citizenship is required; although the applicant may make short visits outside the United States, long or repeated absences may cancel previous periods of residency. The applicant must demonstrate the ability to read, write and speak ordinary English and an understanding of the history and fundamentals of American government. Good moral character and good "citizenship" are also requirements. For military spouses, the residence and presence tests can be waived if the alien intends to reside overseas with the citizen spouse at the latter's duty station or the citizen spouse dies during a period of honorable active duty service and the parties were then living together in marriage.

B. Children. Children can be derivatively naturalized with parent(s) if: lawfully admitted and present in the U.S. at the time of naturalization; under the age of 18 when naturalized; and both parents are naturalized, or the parent with custody is naturalized. 8 U.S.C. § 1432. Children can be naturalized upon petition of a citizen parent if: under 18; present in the U.S. when naturalized; and resides in the U.S. with the citizen parent or resides overseas with the adoptive citizen parent who is employed by the U.S. 8 U.S.C. § 1433.

C. Administrative Conferral of Citizenship on Adopted Children. Under 8 U.S.C. § 1452(c), a child born outside the U.S. and adopted by a U.S. citizen (by birth or by naturalization) before the child's 16th birthday may receive a certificate

of citizenship. The citizen parent must apply for the certificate before the child reaches 18; the child must be residing in the U.S. in the custody of the adoptive parent, pursuant to a lawful admission for permanent residence.

D. Peacetime Military Service. Once the member is an LPR and has served honorably for 3 continuous years, special exemptions apply. The member may apply immediately for naturalization; the petition does not have to be filed in the place of residence. To qualify for these exemptions, the member must file the petition for naturalization while on active duty or within 6 months after discharge. See MILPERSMAN 6210180 and MCO 5802.2A for more information on naturalization of service personnel.

E. Wartime Service. Aliens who served honorably in WWI, WWII, the Korean War, or the Vietnam War can be naturalized *if* they were in the U.S. at the time of enlistment or induction. Under 8 U.S.C. § 1440, any alien with honorable active service during any part of the above wartime periods has the opportunity to become a citizen. LPR status is *not* required if the member was inducted, enlisted, or reenlisted at any time in the United States, the Panama Canal Zone, or American Samoa. Similarly, residency in the United States or in a particular jurisdiction is NOT required. The member may file a petition for naturalization before ANY competent U.S. court.

F. Spouses of U.S. Citizens. The spouse of a U.S. citizen is eligible for immediate LPR status. The spouse is then eligible for naturalization after 3 years of marriage. The spouse must have been physically present in the United States for one and a half years during this period, reside at least 6 months within the state where the petition is to be filed, and be of good moral character.

G. LPR Spouses of Military Personnel Ordered Overseas. The law permits naturalization, without regard to length of residence, of a lawful permanent resident who is about to accompany a U.S. citizen spouse overseas pursuant to official orders. See MILPERSMAN 6210200 and Chapter 3 of NMPCINST 4650.2A or MCO 5802.2A.

3707 **PROCEDURE FOR IMMIGRANT VISA FOR SPOUSE UPON OVERSEAS MARRIAGE.**

Marriage overseas is governed by service regulations. Any member planning to marry a foreign national must submit an application for permission to marry to the area commander or designated representative. See MILPERSMAN 6210160; BUPERSINST 1752.1; MCO 1752.1C. Intended spouses receive medical screening and background investigations to ensure eligibility for immigrant visas. Visas may be denied for such reasons as drug trafficking, criminal convictions, contagious diseases, and prostitution. After obtaining command approval and getting married, the member may petition for an immigrant visa for the

spouse at the U.S. Consulate in the country where the spouse resides. Petitions cannot be filed in the United States.

A. A Valid Marriage. The marriage must be valid under the law of the jurisdiction where it was performed. The parties must have had legal capacity to marry and not be disqualified by reason of age, blood relationship, invalid prior divorce or other legal impediment. For immigration purposes, proxy marriages not valid unless consummated. 8 U.S.C. § 1101(a)(35). "Sham marriages," entered into to confer an immigration benefit, will not be recognized for immigration purposes. A marriage will be presumed to be a sham marriage if entered into within 2 years of immigration and dissolved within 2 years of arrival or the immigrating spouse refuses to fulfill marital agreement. 8 U.S.C. § 1251(c). The parties must still be married when the immigration benefit is conferred. The separation of the parties may be some evidence of a sham marriage but it will not automatically negate the validity of the marriage.

B. Filing. The citizen member files a petition (Form I-130) to establish immediate-relative qualification. The citizen is the "Petitioner"; the alien spouse is the "Beneficiary." The member files at the INS district office for location of petitioner's residence (or consulate, if petitioner resides overseas). The petition must be accompanied by proof of the member's citizenship; birth certificate (or authorized substitutes under 8 C.F.R. § 204.2(a)); the marriage certificate; all prior divorce decrees and spousal death certificates; and the filing fee, currently \$35. After the INS investigates, the petition is approved or denied. If denied, the member can appeal to the Board of Immigration Appeals within 15 days of the mailing of the notification of denial. If approved, the petition is forwarded to the appropriate consulate for State Department action on the application for an immigrant visa. The member receives a Form I-191.

C. Visa Processing. The U.S. Consulate serving the area where the Beneficiary resides sends an immigrant visa application packet to the Beneficiary. 22 C.F.R. Part 42. The Beneficiary prepares a "biographic data sheet" (Form 179) and gathers necessary documentation, including: a passport; birth certificate; police certificates; court records; military records; evidence of support or employment in the United States; marriage certificate; etc. When the Beneficiary advises that all the documents are gathered, the Consulate schedules an interview with the alien. The interview will likely be brief and address only the marital relationship and major grounds for exclusion. The visa is then issued or denied. If issued, the visa is valid for only 4 months, renewable only upon a showing that it was not used for reasons beyond the Beneficiary's control. 8 U.S.C. § 1201(c). The processing time may range from a few weeks to several months. The visa fee, currently \$150, must be paid, together with the cost of the physical exam. A separate petition (Form I-130) and visa application (Form 230) must be processed for each child.

1. If the member is a U.S. citizen, the spouse's visa can be issued without regard to quota limitations. If the member is an LPR, a second preference visa may be issued to the spouse upon receiving a numerical quota. Depending on the country of origin, waiting periods for a quota can be lengthy. By applying for "humanitarian parole" status, a member's spouse and children may be able to join the member in the United States while waiting for a quota. Applications for humanitarian parole should be forwarded to INS via OJAG.

2. If the member is a non-resident alien (no LPR status), the spouse and children may be allowed to enter the United States on a 6 month B-2 visa. Before the B-2 visa expires, the member should apply to INS to change the spouse's or child's status to "indefinite voluntary departure" until the end of the member's service commitment. Although permission to work is not guaranteed, an alien spouse with indefinite voluntary departure status may also request a work permit from INS.

D. Permanent Resident Status. When the visa petition is approved, or parole granted, the alien spouse may travel to the United States. While in a parole status, family members should not depart the United States without first obtaining a right of reentry from INS. Formerly, all alien spouses received full permanent resident alien status upon arrival. This rule now applies only if the parties were married for 24 months or longer before the alien enters the U.S. If the marriage is less than 24 months old at the time of entry, the alien now receives permanent resident status on a conditional basis.

E. Removal of Conditional Status. Under 8 U.S.C. § 1186a, the conditional status is removed on a showing that the valid marriage is still intact. Unless the citizen spouse has died, both parties must file the petition for removal of the conditional status. The petition must be filed within the 90 days preceding the second anniversary of the alien's receiving conditional permanent residence status. Failure to file within the window results in termination of resident status, unless good cause can otherwise be shown. The contents of petition, specified in 8 U.S.C. § 1186a(d), are designed to satisfy INS that the marriage is not a sham. The truth of the matters stated in the petition are evaluated in an interview with the parties conducted by an INS agent within 90 days of the filing of the petition (can be waived by the INS in "appropriate cases"). If INS determines that the marriage is valid, the conditional status is removed and the alien becomes a permanent resident alien. The time spent in the conditional status counts for purposes of qualifying residence for naturalization.

3708 **EXCLUSION OF ALIENS.** Under 8 U.S.C. § 1182(a), aliens can be excluded on a variety of grounds. Grounds for exclusion include mental defects, disabilities affecting the alien's ability to earn a living, conviction of crimes

involving moral turpitude, immoral sexual conduct, and drug offenses. As of 1 December 1987, a foreigner who tests HIV positive is ineligible to immigrate to the United States. Exclusion can result in visa denial or in denial of admission even if a visa has been issued. 8 C.F.R. Parts 235, 236. Many grounds afford a hearing and appeal to the Board of Immigration Appeals.

3709 STATUS OF IMMIGRANTS IN THE UNITED STATES.

Once entered, an immigrant is a "person" within the meaning of the Constitution. Consequently, immigrants are subject to taxation and military induction to the same extent as citizens.

A. **Travel.** Immigrants must report changes in address within 10 days and are subject to deportation under 8 U.S.C. § 1251 for crimes and other misdeeds. Immigrant travel abroad is subject to the requirements of 8 C.F.R. Part 211 unless the immigrant has LPR status or is a U.S. servicemember. Each entry is an "admission to the U.S." The alien must travel on a valid passport and may present an Alien Registration Card in lieu of an immigrant visa. The absence must be temporary, i.e., 1 year or less, without relinquishment of U.S. "residence." If the absence will exceed 1 year, the alien must apply for a nonrenewable, 2-year Reentry Permit before departure from the United States. 8 C.F.R. Part 223. An Alien Registration Card, however, is sufficient for re-entry documentation after an extended absence abroad for a spouse or child of a civilian U.S. employee or servicemember provided that alien resided with the employee or member abroad with whom they will be reunited within 4 months of the employee's or soldier's return. 8 C.F.R. § 211.1(b).

B. **Dual Nationality.** Upon naturalization the new U.S. citizen takes an oath "to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject of citizen . . ." 8 U.S.C. § 1448. Further, the naturalized citizen loses U.S. citizenship by obtaining naturalization after age 18 in a foreign state. 8 U.S.C. § 1481.

PART IV: INSTALLATION LAW

CHAPTER 41

PHYSICAL SECURITY

4101 **THE COMMANDER'S AUTHORITY.** The military commander of a shore installation has broad power to establish the necessary regulations for the protection and security of places and property within the command. This authority has been implemented in the Navy by SECNAVINST 5511.36. In addition to the inherent power of a commanding officer, this authority is premised on two statutes.

A. **Power to Regulate.** The Internal Security Act of 1950, 50 U.S.C. § 797, provides that violation of any regulation issued by a military commander for the protection or security of property and places subject to military jurisdiction shall be a criminal violation subject to up to one year in jail and a \$5000 fine.

B. **Trespass.** The second statute, enforced primarily against people who are not subject to the UCMJ, is 18 U.S.C. § 1382, which provides:

Whoever, within the Jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation for any purpose prohibited by law or lawful regulation; or

Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof -

Shall be fined not more than \$500 or imprisoned not more than six months or both.

4102 **JURISDICTION AND LAW ENFORCEMENT.** Installation commanders discharge their responsibility for maintaining law and order in part through security personnel at their installations. The authority of security is derived from their status as Federal employees and from the authority of the commanding officer. The type of legislative jurisdiction on an installation does not affect the authority of security personnel to enforce the laws on the base. As security personnel travel between areas of different types of Federal jurisdiction on the base, their

authority to maintain law and order by detaining suspects, to appropriate state or Federal authorities does not change. Modification of the Federal legislative jurisdiction at a base will not increase or decrease the authority of security personnel to enforce laws on the base. Where appropriate, training of base security personnel should address this matter. See Chapter 2, Navy Law Enforcement Manual (OPNAVINST 5580.1) for a discussion of Federal jurisdiction and law enforcement authority. The Federal Government holds land under varying degrees of jurisdiction. These fall into four categories:

A. Exclusive Legislative Jurisdiction. The Federal Government has exclusive legislative jurisdiction when a state grants to the Federal Government all of its authority to enact and enforce general laws and regulations with the sole reservation by the state of the power to serve civil and criminal process for activities occurring off the base. To provide a comprehensive system of criminal laws for ceded areas under legislative jurisdiction, Congress enacted the Assimilative Crimes Act, 18 U.S.C. § 13, that adopts state criminal laws as Federal law. Thus, conduct amounting to violations of state criminal law in areas under exclusive legislative jurisdiction can be prosecuted in the Federal court system. State and local police have no authority to enter and make arrests or conduct investigations for crimes committed in such areas unless so requested by an appropriate authority to do so. See Appendix XVI of OPNAVINST 5530.14B, entitled: Assistance of State Law Enforcement Officers Aboard Exclusive Federal Jurisdiction Enclaves.

B. Concurrent Legislative Jurisdiction. State and Federal laws are applicable in a concurrent legislative jurisdiction area. Either Federal or state authorities, or both, have the authority to prosecute crimes committed in this area. The Assimilative Crimes Act, by its terms, applies to areas under concurrent legislative jurisdiction.

C. Partial Legislative Jurisdiction. This jurisdictional status occurs where the state grants to the Federal Government the authority to exercise certain powers within an area but reserves for exercise only by itself, or by itself as well as the Federal Government, other powers constituting more than merely the right to serve civil and criminal process. As to those state powers granted by the state to the Federal Government without reservation, administration of the Federal area is the same as if it were under exclusive federal jurisdiction. As to powers reserved by the state for exercise only by itself, administration of the area is the same as though the United States had no jurisdiction. The right most commonly reserved by a state is the right to tax.

D. Proprietary Interest Only. The Federal Government has no legislative jurisdiction over lands held by a proprietary interest only, but has the same rights in such lands as does any other landowner. In these areas, state authorities must be called upon to prosecute most crimes.

E. Legal Effect. Regardless of the legislative jurisdictional status of the property concerned, the United States may exercise in all places the authority essential to the performance of its constitutional functions without interference from any source. Thus, states may not exercise authority that would interfere with or restrict the United States in the use of its property or obstruct the exercise of any of the powers the states relinquished to the United States under the Constitution. While the type of Federal jurisdiction over the area of an offense can be an important issue when civilian authorities prosecute crimes committed on base, it does not affect the authority of base security personnel to enforce the laws and maintain order on a base. The SJA can get information on the type of Federal jurisdiction on their base from the regional office of the Naval Facility Engineering Command.

4103 **ACCESS TO INSTALLATIONS.** Admission to a military installation is contingent on the commander's approval. Article 0810, U.S. Navy Regulations, 1990. The commander has inherent authority to ensure the installation is maintained in a state of military readiness. That authority includes the power to exclude civilians from a military installation. Cafeteria Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961); Greer v. Spock, 424 U.S. 828 (1976); United States v. Harris, 5 M.J. 44 (C.M.A. 1978).

4104 **ENTRY FOR AN UNLAWFUL PURPOSE.** The first part of 18 U.S.C. § 1382 establishes criminal penalties for entry upon a military installation for a purpose prohibited by law.

A. Mere Trespass. Violation of a base regulation prohibiting entry without permission of the commanding officer is an entry for a "purpose prohibited by law." United States v. Floyd, 477 P.2d 217 (10th Cir.), cert. denied, 414 U.S. 1044 (1973)(Defendant had actual notice; gates were guarded; base was surrounded by a fence). The "purpose" can consist of unauthorized entry itself, i.e., the government need not prove that the trespasser committed a crime other than the entry itself. United States v. Parrilla Bonilla, et. al., 648 F.2d 1373, 1377 (1st Cir. 1981); but see United States v. Patz, 584 F.2d 927, (9th Cir. 1978)("Purpose prohibited by law" did not encompass entry on to a military reservation in violation of state trespass laws). The defendants must have actual notice that entry upon a military reservation is prohibited if unlawful entry is the sole basis of the government prosecution. Notice can be established by a fence around the perimeter of an installation with signs posted at appropriate intervals.

B. Entry to Violate the Law. Entry upon a military reservation for the purpose of damaging government property violates of 18 U.S.C. § 1832. Specific intent to damage government property probably need not be shown. United States v. Mowatt, 582 F.2d 1194, 1203-04 (9th Cir. 1978); but see Holdbridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960)(Dicta). The primary statute making damage of government property a criminal offense is 18 U.S.C. § 1361, which provides for felony penalties if the value of the property damaged exceeds \$100. Other pertinent

criminal statutes include 18 U.S.C. § 207 (removal, mutilation, or destruction of government records and documents), 18 U.S.C. § 2153(a) (attempting to injure war material, war premises, or war utilities), and 50 U.S.C. App. § 462(a) (attempting to hinder administration of the draft laws).

4105 REENTRY AFTER A BAR ORDER. The second part of § 1382 establishes criminal penalties for reentry onto to military reservation after being ordered not to reenter. An installation commander normally issues a "bar letter" to accomplish this purpose, i.e., a letter informing a person that he is not to reenter a particular military reservation.

A. Who Must Issue the Bar Letter. Section 1382 requires the order not to reenter be issued by "any officer or person in command or charge" of the military installation concerned. United States v. Ramirez Seijo, 281 F. Supp. 708, 710 (D.C. Puerto Rico 1968) (Conviction reversed where the defendant's bar letter was signed by an "Area Engineer of the U.S. Army Corps of Engineers," a title insufficient to establish that the signatory was an officer in charge as required by § 1382). The bar letter (aka "persona non grata" (PNG) letter) be signed by the installation commanding officer, acting commanding officer, or a person authorized to sign by direction of the commanding officer. See OJAG opinion Serial 13/5120 dtd 5 February 1982.

B. Delivery and Knowledge. The person barred from reenntering on to a military installation must receive notice of this fact. The best means of delivering a bar letter is to personally hand it to the recipient, with a record made of the date of delivery and the person making the delivery. Delivery can also be shown by registered mail with return receipt. The addressee of the bar letter must personally sign for the bar letter. In United States v. Ramirez Seijo, supra, knowledge was not established where the defendant's father signed the registered-mail receipt, and there was no independent evidence establishing the defendant's knowledge of the order. If personal delivery is attempted and refused, the order should be read to the person, with a notation to that effect made on the letter.

C. Due Process

1. Reasonableness of Bar Order. A commander's decision to exclude civilians must not be unreasonable, arbitrary or capricious. A person cannot be excluded solely by reason of his or her race or religion. Bridges v Davis, 443 F.2d 970, 445 F.2d 1401 (9th Cir. 1971), cert. denied, 405 U.S. 919 (1972). Cafeteria Workers v. McElroy, supra, suggests that courts are to examine for reasonableness only the announced ground for exclusion. Some courts have gone beyond that and examined whether the announced reason for the exclusion had a basis in fact. Serrano Hedina v. United States, 709 F.2d 104, 109-10 (1983).

2. Notice and Hearing Requirements. Generally, a commanding officer need not give prior notice nor grant a hearing before excluding a civilian from an installation. Denial of notice and a hearing has been upheld even when the bar effectively nullifies the recipient's privileges to use exchange, commissary, and recreational facilities. Toker v. Hearne, 699 F.2d 753 (5th Cir. 1983), cert. denied in 104 S. Ct. 146. Different standards of due process may apply if a person is excluded from base for exercise of first amendment or other constitutional rights. Although the law is unsettled in this area, notice and a hearing would be the safest way to proceed if the sole basis for exclusion was exercise of constitutional rights. Serrano Medina v. United States, supra at 108-9; Flower v United States, 407 U.S. 197, 92 S. Ct. 1842; 32 L. Ed.2d 653 (1972); Kiiskila v. Nichols, 433 F.2d 745 (7th Cir. 1970) (enbanc). See sample notice and hearing documents at the end of this chapter. First Amendment freedoms are discussed in more detail later in this part of the Deskbook.

D. Access to Medical Facilities. If the recipient of the bar letter is entitled to military health care, the bar letter should be crafted to accomplish the commander's goal of protecting the installation without infringing on this important individual privilege. The limited bar can permit the recipient to enter the installation only when driving to and from the medical facilities by the most direct route. If that is inappropriate, the order can establish advance scheduling and escort requirements. A dependent should be denied access to medical facilities when barred from an installation ONLY if specific VITAL interests in command security, safety, or good order will be risked in providing access to the medical facilities. JAG:131.1:TDS:cmt Ser: 13/5042 dtd 5 Feb 1980. Limited bar orders may also be appropriate in other circumstances involving dependents, members of reserve units, or Civil Service employees.

E. Enforcement During an Open House. Installations periodically hold an "open house" during which members of the public are invited to visit the installation. In United States v. Albertini, 472 U.S. 675 (1985), the Supreme Court held "[w]here a bar letter is issued on valid grounds, a person may not claim immunity from its prohibition on entry merely because the military has temporarily opened a military facility to the public."

F. Contents of Bar Order. Detailed recommendations on the content of a bar letter are contained in Comment, Unlawful Entry and Re-Entry Into Military Reservations in Violation of 18 U.S.C. § 1382, 53 Mil. L. Rev. 137 (1971).

SAMPLE CIVILIAN MISCONDUCT BOARD DOCUMENTS

MEMORANDUM

From: Station Judge Advocate
To: Civilian Misconduct Board Members

Subj: CIVILIAN MISCONDUCT BOARD MEETING ICO _____

Ref: (a) Station Instruction 12751.1

1. Per the reference, a meeting of the Civilian Misconduct Board will be held at (date and time) in the Station administrative conference room. Please notify this office if you will be unable to attend.

Very respectfully,

STATION JUDGE ADVOCATE

Copy to:
CMAA

From: Commanding Officer, Naval Station
To: (Military Sponsor)

Subj: CIVILIAN MISCONDUCT BOARD

Ref: (a) Local Instruction

1. I have received reliable evidence that your dependent, (NAME), has been involved in the following incident of misconduct:

2. The allegation against your dependent is based on the following information:

3. Per the reference, your dependent's case has been scheduled for a hearing before the Civilian Misconduct Board at (TIME) on (DATE), at the Administration Conference Room. The Board will hear all information in regard to the alleged misconduct and will provide the Commanding Officer a recommendation as to the appropriate administrative action (if any) to be taken. Administrative actions that may be taken as a result of the hearing include:

- a. Dismissal (with or without a warning);
- b. Formal warning;
- c. Suspension/Revocation of base privileges;
- d. Termination of Military Family Housing privileges;
- e. Early Return of Dependents; and
- f. Referral to civilian criminal authorities.

3. You and your dependent have a right to submit matters for the board's consideration. These matters may be submitted orally by personally appearing before the board at the scheduled time, or may be submitted in writing to the Station Judge Advocate prior to the hearing. In addition, you and your dependent have the right to have witnesses attend the proceeding if their statements will be relevant and if they are reasonably available. A witness is not reasonably available if the witness requires reimbursement by the United States for cost incurred in appearing, cannot appear without unduly delaying the proceedings, or, if a military witness, cannot be excused from other important duties.

4. If you and your dependent desire to appear at the hearing and/or present witnesses or other evidence, contact the Station Judge Advocate at 649-3267 prior to (DATE).

By direction

CIVILIAN MISCONDUCT BOARD GUIDE

CHAIR: The board will come to order. This meeting of the Civilian Misconduct Board is convened per [local instruction]. The following regular board members are present:

Deputy Commander
Executive Officer
Chaplain
Station Judge Advocate
Command Master Chief
Command Ombudsman

A quorum of more than 3 members is present.

CHAIR: (To Alleged Offender) You are suspected of having committed the following incident of misconduct:

(Read relevant portion of case summary)

I will now advise you of your rights in connection with this hearing and of administrative actions that may be taken in this case:

You and your sponsor have the right to appear at this hearing, to be informed of the allegations against you and to present evidence and call witnesses in your behalf, at no cost to the government and in a manner not to delay the proceedings.

Findings of misconduct must be made by a majority vote. In case of a tie vote on the issue of whether or not misconduct has occurred, no adverse action may be recommended.

In the event a finding of misconduct is reached, the board may recommend the following administrative actions:

Issuance of a formal letter of warning;
Suspension or revocation of base privileges;
Notification of misconduct to Civilian Personnel Office; Revocation of Navy Family Housing privileges;
Early return of dependents; and
Referral to civilian criminal authorities

There are several procedural rules in connection with this board which I shall explain to you.

First, this board is an administrative proceeding and the rules of evidence do not apply. The members of this board will independently consider all relevant evidence presented and determine the proper weight to be given the evidence.

Second, the Master-at-Arms will present the evidence against you. After a witness testifies you will be given an opportunity to direct questions to the witness. Any board members desiring to ask questions of a witness may then do so after first obtaining recognition by myself as Chairman. After presentation of the evidence against you, you will be asked whether you wish to call any witnesses, present any evidence, or make any statement.

Third, following presentation of all the evidence, you and your sponsor will retire while the board deliberates. You will be recalled to the meeting when the board has reached its findings and recommendations and will be informed of the board's action.

Do you have any questions concerning your rights or the procedures of this board?

CHAIR: (To Master-at-Arms) Please present the case against ____.

MAA: The case against _____ is based upon:

(Cite documents, witnesses, etc.)

The first witness to be called in this case is

CHAIR: (To Witness) You have been asked to appear before this board to offer information concerning an allegation of misconduct that has been brought against _____. You will be expected to provide this information to the board in a truthful and factual manner. Please proceed.

MAA: (At the conclusion of all evidence) This completes the case against _____.

CHAIR: (To Alleged Offender) Do you desire to present matters to this board? (If yes) You may proceed.

(Presentation of sponsored dependent's case):

CHAIR: Do you have other matters to present? (If not): You may retire to the waiting area until the board has reached its findings.

NOTE: At this time the board will discuss the case and then vote on whether misconduct has occurred. If misconduct is found by a majority vote to have occurred, the board will discuss an appropriate recommendation for action. The board will then determine by a majority vote what action will be recommended. After the vote, the sponsor and dependent will be recalled to the meeting.

CHAIR: (Dependent's Name), this board has found that you have/have not committed misconduct as alleged.

(If no misconduct: You are excused. Thank you for your participation in this hearing.)

(If misconduct: The board has elected to recommend the following action to the Commanding Officer:_____.

You have three working days to submit matters in writing to the Commanding Officer, via this board, prior to the recommendations being forwarded.

You will be notified in writing of the final action in this case by the Commanding Officer.

You and your sponsor are excused. This hearing is adjourned.

PRIVACY ACT STATEMENT - CIVILIAN MISCONDUCT BOARD

This statement is provided in compliance with the provisions of the Privacy Act of 1974 (Public Law 93-579) which require that Federal agencies must inform individuals who are requested to furnish personal information about themselves as to certain facts regarding the information stated below.

1. **Authority.** 5 U.S.C. § 301; 10 U.S.C. § 2774 (as amended by Public Law 92-453).
2. **Principal Purposes.** To assist in the arrangement, supervision, and administration of personal services, benefits and entitlements for U.S. Armed Forces members, DOD employees, and their dependents.
3. **Routine Uses.** Law Enforcement; Congressional Inquiries; Private Relief Legislation; Disclosures required by International Agreements; Disclosure to state and local taxing authorities; Disclosure to state and local taxing authorities; Disclosure to the Office of Personnel Management; Disclosure to the Department of Justice for Litigation; Disclosure to Military Banking Facilities Overseas; Disclosure to the National Archives and Record Administration; and Disclosure to the Merit Systems Protection Board.
4. **Mandatory or voluntary disclosure and effect on individual not providing information.** Disclosure is voluntary, and if you do not provide the requested information any determinations or evaluations made as a result of this board will be made on the basis of the evidence contained in the record.

ACKNOWLEDGEMENT

Today, _____, 19____, I acknowledge that I have received the above Privacy Act Statement from _____.

Signature

From: Commanding Officer, Naval Air Station

To:

Subj: PROHIBITION FROM ENTRY TO NAVAL AIR STATION

1. You are hereby advised that due to your discharge from the U.S. Navy by reason of misconduct you are restricted from further entry to all government property under the cognizance of the Commanding Officer, Naval Air Station, _____ -

_____. The following areas are specifically included: Naval Air Station Main Complex; Navy Exchange-Commissary Mall Complex on Highway 1; Carney Housing and Charles Field. Should you be found within the limits of these restricted areas, you will be guilty of trespassing in violation of 18 U.S.C. § 1382 and will be subject to a fine of not more than \$500 and imprisonment in a federal penitentiary for not more than six months.

2. You are therefore advised that effective the date and hour of your discharge you are permanently prohibited from coming aboard this station or any of the above specified areas. In the event you should be found within the limits of any of these areas, you shall be prosecuted in federal court for violation of the above-mentioned statute.

J. P. FLAGG

Copy to:

Legal Officer, NAS

CO, (parent command)

Security Officer, NAS

Discipline Officer, NAS

Master-at-Arms, NAS

I hereby acknowledge receipt of this letter:

Signature:

Date:

Time:

Witness:

From: Commanding Officer, Naval Station, Treasure Island, San Francisco, California
94130

To: SR USN

Subj: ORDER NOT TO REENTER THE DEPARTMENT OF THE NAVY'S
INSTALLATION AT TREASURE ISLAND, SAN FRANCISCO, CA

Ref: (a) NAVSTATINST 3050.1

1. You are being removed as a trespasser from the Naval Station, Treasure Island and ordered not to reenter the confines of this installation without permission of the Commanding Officer or an Officer designated by him to issue a permit to reenter. As soon as you leave the Bay Bridge, you are on the Naval Station.

2. Your attention is invited to the provisions of Title 18, U.S. Code § 1382 which states in part:

"Whosoever enters or is found on any such reservation after having been removed therefrom by an order not to reenter by an Officer or person in command or charge thereof shall be fined no more than \$500.00 or imprisoned for not more than six months or both."

3. The provisions of Title 18, U.S. Code § 1301 also applies to the commission of any unlawful act on the Military Reservation.

R. E. VIBRASSAE

ACKNOWLEDGMENT

I have read and understand the information above.

(Date)

(Signature)

Witnessed:

M. A. Blask, PNCS(SW), USN, Director, Transient Personnel Division

4106

LAW ENFORCEMENT AND SECURITY PERSONNEL

A. The Use of Force. If security responsibilities cannot be discharged without using force, personnel shall use the minimum amount of force necessary to discharge their assigned responsibilities. Base police need not be "deputized" as State officers. Base police may apprehend civilian offenders or fugitives on base and deliver them to civil authorities under Article 0809, U.S. Navy Regulations, 1990. Appointment as State officers would not give civilian base police any special arrest and delivery authority; rather, it would only create procedural complications in the apprehension and delivery of military members.

B. Deadly Force. Deadly force is that force which a person uses with the purpose of causing or which he knows, or should know, would create a substantial risk of causing death or serious bodily harm. Rules regarding the use of force, including deadly force, are contained in SECNAVINST 5500.79 and OPNAVINST 5580.1 series, Navy Law Enforcement Manual. These instructions should be consulted before giving any advice concerning the use of force. Generally, deadly force is justified only under conditions of extreme necessity as a last resort, when all lesser means have failed or cannot reasonably be employed, and only under one or more of the following circumstances:

1. Self-defense.
2. To protect property involving national security.
3. To protect property not involving national security but inherently dangerous to others.
4. To prevent serious offenses against persons.

C. Gate Inspections

1. Scope. An inspection upon entry or exit from a military installation is expressly permitted under M.R.E. 313. Civilians as well as servicemembers can be subject to these inspections. Examination of pedestrians as well as vehicles is permissible under the rule. United States v. Robinson, 14 M.J. 903 (N.M.C.M.R. 1982). The examination can be thorough, including inspecting luggage, briefcases and wallets. Pat-down examinations of the person have also been held to be acceptable. United States v. Alleyne, 13 M.J. 331 (C.M.A. 1982) The scope and frequency of the gate inspections should be linked to specific command concerns. Donovan v. Dewey, 452 U.S. 594 (1981).

2. Refusal to Permit Inspection. Individuals refusing to permit an examination of their person, vehicle, or possessions upon entry to the installation, he

should not be inspected over their objection, but should be denied entry. Such refusal to permit an inspection is a basis to bar a civilian from the installation pursuant to 18 U.S.C. § 1382. Inspecting vehicles and pedestrians LEAVING the installation, can be legally conducted despite objection.

3. Authority. Though not clearly specified by M.R.E. 313(b), OPNAVINST 5530.15, para. 12, establishes the installation commander as the person who should prescribe the procedures for entry and exit searches. The installation commander should sign the inspection procedure personally, particularly to avoid problems addressed in United States v. Kalscheur, 11 M.J. 373 (C.M.A. 1981).

4. Inspector Discretion. A valid gate inspection procedure in the U.S. requires that the personnel conducting the inspection have no discretion in most aspects of implementing the inspection. The order authorizing the inspection should specify the time the inspection will be conducted, the method of randomly selecting the vehicles to be stopped. (e.g., every 10th car), the location of the inspection, and the procedures to be followed if something is discovered. United States v. Harris, 5 M.J. 44, 65 (C.M.A. 1978). The scope of the inspection should be specified in as much detail as possible, although United States v. Vargas, 13 M.J. 713, 715 (N.M.C.M.R. 1982) upheld a gate inspection where the inspector exercised some discretion and searched vehicles with varying degrees of thoroughness. Because of the compelling interests overseas, personnel conducting gate searches overseas are allowed "considerable discretion" under M.R.E. 314(c) in determining whom to question or search. United States v. Alleyne, 13 M.J. 331, 336 (C.M.A. 1982).

D. Sobriety Checkpoints. The fourth amendment does not forbid the brief stop and detention of all motorists passing through a highway roadblock set up to detect drunk driving. Neither probable cause nor reasonable suspicion are required; the stop is constitutionally reasonable. Michigan Dep't of State Police v. Sitz, 110 S. Ct. 2481 (1990). SJAs should assist base law enforcement personnel in developing SOPs to address the practical issues: how long should the checkpoint last; what procedures will be followed; who will authorize; what notice will be given to the public; what procedures will be followed when a driver is found to be impaired; etc.

E. Aircraft Hijacking.

1. FAA Responsibility. Under 49 U.S.C. § 1357(e), the Federal Aviation Administration (FAA) has exclusive responsibility for directing U.S. law enforcement activity affecting the safety of persons aboard aircraft which are "in-flight" and involved in an air hijacking. The statute is implemented in the Navy by OPNAVINST 3730.9A. For purposes of this instruction, an aircraft is considered to be "in-flight" from the moment all external doors are closed following embarkation, until the moment any such door is opened for disembarkation. The FAA's exclusive law enforcement responsibility for in-flight aircraft extends to military aircraft and military contract aircraft, on or off military installations, worldwide.

2. Commanding Officer (CO) Responsibility. A CO has the inherent authority and responsibility to protect DoD property and functions, e.g., combat air operations. Articles 0802 and 0826, U.S. Navy Regulations (1990). The FAA's responsibility for U.S. law enforcement does not limit the CO's authority and responsibility to protect DoD property and functions. Action taken by DoD personnel in furtherance of a CO's authority and responsibility to protect DoD property and functions, even if such action incidentally involves quasi-law enforcement activity, takes precedence over law enforcement activity and is not subject to the direction of the FAA.

3. Assistance to the FAA. Where action to protect DoD property or functions is not necessary, a CO may, if requested, render appropriate assistance to the FAA or other law enforcement agencies, regardless of the status of the aircraft. In determining whether assistance is appropriate the implementing instruction of the Posse Comitatus Act SECNAVINST 5820.7A should be consulted, along with OPNAVINST 3730.9A.

4. Aircraft Anti-Hijacking Prevention Program. OPNAVINST 3730.9A, section 5a, contains the procedures to be followed for preventing aircraft hijacking. OPNAVINST 5530.15, Section III, outlines procedures for aircraft security.

F. Marine Corps Security Force (MCSF). The MCSF provides physical security for those portions of naval activities or vessels to which they are assigned and operates under the direct operational control of the activity or ship to which assigned. A detailed list of appropriate and inappropriate duties for MCSF personnel is contained in SECNAVINST 5530.4.

G. Nuclear Weapons Accidents and Incidents. There are several types of nuclear incidents that may require a response from a command, such as an aircraft accident involving nuclear weapons or a terrorist incident involving an improvised nuclear device. An appropriate response to these incidents requires advance planning. General guidance is contained in OPNAVINST 3440.15.

1. Release of Information Concerning Nuclear Weapons. Members of the naval service shall not reveal, purport to reveal or cause to be revealed any information, rumor, or speculation with respect to the presence or absence of nuclear weapons or components on board any ship, station, or aircraft, either on their own initiative or in response directly or indirectly, to any inquiry. OPNAVINST 5721.1D. Some exceptions to this are:

a. Emergency Contingency Planning. The presence or absence of nuclear weapons will neither be confirmed nor denied when coordinating contingency planning with state and local officials. In situations where classified information on the presence of weapons is required to develop emergency plans, only that information required to permit radiological emergency planning shall be

revealed, after considering national defense consequences, and then only when releasing such information is in the best interest of national emergency preparedness planning. The information shall be provided only to individuals within state and local governments who have been identified by CNO or CMC to the concerned commands as being properly cleared and having a need to know. Classified technical information on weapons or other military nuclear equipment is not authorized for release to state or local governments.

b. Public Safety. In the interest of public safety or to reduce or prevent widespread public alarm, in the case of confirming the presence of nuclear weapons or radioactive nuclear weapon components may be made by any on-scene commander. (In the case of a nuclear accident or incident in the United States and its territories and possessions.) OPNAVINST 5721.1D. The procedure for release of information under this exception is contained in OPNAVINST 3440.15, Enclosure (3).

c. Overseas. In overseas areas outside the United States and its territories or possessions, Unified Commanders or their designees, with the concurrence of the host government through the appropriate chief of the U.S. mission, Department of State, may officially confirm or deny the presence of nuclear weapons or radioactive nuclear weapon components at the scene of air accident or significant incident either in the interest of public safety or to reduce public alarm. The procedure for releasing information under this exception is contained in OPNAVINST 3440.15, Enclosure (3).

2. Notification Procedure. When a nuclear incident occurs, a call should be made immediately to the Navy Department Duty Captain at the Navy Command Center (AV 229-0231). Other notification procedures are outlined in enclosure (5) to OPNAVINST 3440.15, and in OPNAVINST 3100.6C.

3. Immediate Response to a Nuclear Incident. For nuclear weapon incidents off station in the United States, its territories or possessions involving the theft, loss, or seizure of such weapons from a Navy activity when the location of the weapons is known, Navy and Marine Corps Security forces will pursue the weapon and establish a National Defense Area (NDA) surrounding the weapon. An NDA is an area established on non-federal lands located within the United States, its possessions or territories, for the purpose of, inter alia, safeguarding DoD material. Authority for an NDA is implicit in 42 U.S.C § 2012, or can be premised on the Federal police powers exercisable under the Supremacy Clause. JAG:131.1:WDC:slb Ser 1315386 of 29 Jun 83. No further action will be taken until the FBI arrives unless necessary in the interest of public safety, as determined by higher authority. The FBI is responsible for coordination of the response to an improvised nuclear device incident per the Joint FBI-DoE-DoD Agreement for Response to Improvised Nuclear Device Incidents, which is contained in OPNAVINST 3440.15.

4. **Planning.** The best way to ensure an adequate response to a nuclear incident is to develop contingency plans and test those plans in periodic exercises. Navy commanders are required to develop contingency plans for certain nuclear incidents per OPNAVINST 3440.15. Guidance on plans and exercises can be obtained from the Fleet Commander. Some of the legal issues that may arise are raised in enclosure (4) to OPNAVINST 3440.15. The SJA should be prepared to be a member of the Command Post Support Staff for a nuclear incident. OPNAVINST 3440.15, enclosure (7), Tab A.

H. **Bomb Threats.** The authority to search persons or property after receipt of a bomb or unconventional threat is contained in M.R.E. 314(i), which provides that "[i]n emergency situations to save life or for a related purpose, a search may be conducted of persons or property in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury." Probable cause is not required. McDonald v. United States, 335 U.S. 451, 454, (1948); United States v. Barone, 330 F.2d 543 (2d Cir. 1964), cert. denied, 377 U.S. 1004 (1964).

1. **No Prior Approval.** A search for a bomb under this rule does not require prior commanding officer approval, even though the search may be of an area in which a person has a reasonable expectation of privacy. Military cases have recognized the emergency exception in different contexts. United States v. Mons, 14 M.J. 575 (N.M.C.M.R. 1982), pet. denied, 15 M.J. 455 (C.M.A. 198) (Evidence lawfully seized after an entry into a barracks room to render emergency aid without prior search authorization); United States v. Smeal, 49 C.M.R. 751, 23 U.S.C.M.A. 347 (1975) (Warrantless entry into the accused's residence by security police was justified response to a telephone call stating that the accused's wife had apparently shot herself)

2. **Investigation After the Bomb Search.** If a search conducted to resolve the bomb threat reveals evidence of a crime, police may remain for a reasonable time to investigate. Entry after a reasonable time has elapsed must be made pursuant to a proper search authorization if the area is one where a person has a reasonable expectation of privacy. United States v. Smeal, *supra*; Michigan v. Tyler, 439 U.S. 699 (1978) (Upheld warrantless entry to fight a fire and investigate origin of fire).

4107

BOMB THREAT PROCEDURE CHECKLIST

A. **Telephonic Threat.** Alert another person without warning the caller. Keep the caller on the line as long as possible in order to complete the Telephonic Threat Complaint (OPNAVINST 5527/8). Alert the On-Scene Coordinator and notify police. Try to find out:

1. When and where is the bomb to go off?

2. What kind of bomb is it?
3. What does the bomb look like?

B. Other than Telephonic. If the suspected bomb is a package, letter, etc., DO NOT HANDLE. Call the police and initiate evacuation plan.

C. On-Scene Coordinator. When an explosive dog team is not available, muster and assign search teams. When an explosive dog team is available, assist MWD team as a spotter and coordinate scene activity.

D. Evacuation. If an explosive dog team is not available, evacuate 300' at conclusion of initial sweep. If an explosive dog team is available, evacuate 300' immediately. If an object is found, evacuate 300 yards, and all buildings having windows facing the danger area within 400 yards. An order to evacuate may be given by the Commanding Officer of Officer-in-Charge (or representative or by the On Scene Commander of a bomb threat area. When declared by the On Scene Commander, the order will be transmitted to the senior member of the command or activity present.

E. Search Procedure

1. Dog Team Not Available. Teams of two search the immediate area for suspicious objects, as discreetly as possible to avoid alarming employees. If nothing is found, prepare for second sweep. Evacuate employees 300' from danger area. Begin in depth sweep of the area. If an object is found, DO NOT HANDLE. Evacuate employees 300 yards from danger area.

2. Dog Team Available. Evacuate employees 300' from the danger area. If an object is found, evacuate employees 300 yards from danger area.

4108 **RESTRICTED WATERS.** Threats to the physical security of Navy ships and installations can come from the water as well as from land. Five different statutes authorize restrictions on waters adjacent to naval installations and property. These restrictions generally include the right to control access of persons and vessels to the restricted waters. The statutes vary in two primary respects: who has the authority to establish a restricted area; and the extent of enforcement powers for the restricted area. Even where Navy personnel have enforcement powers concerning restricted waters, allowing law enforcement personnel, e.g., Coast Guard, to enforce restricted waters regulations may be preferable in appropriate cases. The statutes discussed in this section generally are inapplicable to physical security of Navy ships and installations in foreign countries.

A. Gunnery Danger Zones. Authority to establish. The Secretary of the Army is empowered by 33 U.S.C. § 3 to prescribe regulations for the use and

navigation of: navigable waters of the United States or waters under the jurisdiction of the United States endangered or likely to be endangered by Artillery fire in target practice or otherwise, . . . or at any Government ordnance proving ground . . . on or near such waters, and of any portion or area of said waters occupied by submarine mines, mine fields, submarine cables, or other material and accessories pertaining to seacoast fortifications."

1. Navy Application. Despite the use of the term "Artillery," the congressional intent evidently was to give the statute such comprehensive scope as to embrace areas endangered by naval gunnery exercises and other analogous activities required to be conducted in the national defenses. JAG:131.3:HRW:sba Ser:933 of 31 Jan 74. Gunnery danger zones are listed in 33 C.F.R. § 204.

2. Enforcement. Regulations establishing gunnery danger zones commonly provide that the gunnery danger zone regulations shall be enforced by a specified commanding officer "and such agencies as he may designate." Navy personnel and vessels may lawfully enforce gunnery danger zone regulations when so designated by the cognizant commanding officer. The Posse Comitatus Act is not a bar, given the express congressional authority. Enforcement powers available under 33 U.S.C. § 3 includes the authority to bar entry into a restricted area by physical means; to order or to warn any violator to vacate the area; forceably to eject the violator and his craft from the area if he fails to comply; forceably to prevent the violator's reentry into the area; and to file a formal complaint to initiate a Federal prosecution. However, 33 U.S.C. § 3 does not grant naval personnel arrest authority. JAG opinion JAG:131.3:HRW:sba Ser:933 dtd 31 January 1974.

3. Other Agencies. The U.S. Coast Guard has enforcement authority and responsibility, including arrest authority, through regulations promulgated under 33 U.S.C. § 3. See 14 U.S.C. §§ 2 and 89 and 33 C.F.R. 1.07 Appendix. In addition, United States marshals for the judicial district in which the subject waters are situated have authority and responsibility to execute in those waters the laws of the United States and all orders issued under the authority of the United States. See generally 28 U.S.C. §§ 569-570, and 18 U.S.C. § 305.3.

B. Army Regulations. The Secretary of the Army is empowered under 33 U.S.C. § 1 "to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as [necessary] for the protection of life and property" Violations are punishable as misdemeanors. Navigation regulations issued pursuant to 33 U.S.C. § 1 are contained in 33 C.F.R. § 207. Per 33 U.S.C. § 413, the Secretary of the Army has designated certain commanding officers as having enforcement authority in several subsections of 33 C.F.R. § 207.750. Such specific authority is necessary for a commanding officer to have enforcement authority. JAG opinion JAG:131.RLS/ WJD:ado Ser: 13/5807 dtd 13 Oct 1977. A commanding officer and his designees have the enforcement powers listed in 33 U.S.C. § 413, which include arrest authority. As with gunnery danger zones, naval personnel can physically bar entry or reentry, and forceably eject

violators. Posse Comitatus does not bar enforcement. Coast Guard personnel and U.S. marshals can enforce these Army regulations.

C. Internal Security Act Regulations. Commanding officers have the authority to issue regulations for the protection of vessels, harbors, ports, piers, water-front facilities and other places subject to their jurisdiction pursuant to 50 U.S.C. § 797, as implemented in the Navy by SECNAVINST 5511.36. The commander must have jurisdiction over the body of water to issue regulations under this statute. Any regulations promulgated under this authority must be conspicuously posted. Naval personnel can enforce regulations issued under 50 U.S.C. § 797. As with gunnery danger zones, they can physically bar entry or reentry and physically eject violators. Although no arrest authority is conferred on naval personnel by 50 U.S.C. § 797, detaining suspected violators is allowed under article 0713, U.S. Navy Regulations. Posse Comitatus is not a bar to enforcement by naval personnel. Coast Guard and U.S. marshals can enforce regulations promulgated under 50 U.S.C. § 797 and arrest violators.

D. Security Zones. A security zone is a restricted area established by the Coast Guard pursuant to The Magnuson Act, 50 U.S.C. § 191, to protect U.S. vessels or property. Regulations under this authority vest certain powers in the "Captain of the Port," who is a Coast Guard officer responsible for law enforcement activity in a specified area. 33 C.F.R. § 6.01-3. The Captain of the Port may establish security zones "to prevent damage or injury to any vessel or waterfront facility, to safeguard ports, harbors, territories, or Waters of the United States or to secure the observance of the rights and obligations of the United States." 33 C.F.R. §§ 6.01-5, 6.01-6. The Coast Guard has the authority under the Magnuson Act to issue an order restricting access to portions of a harbor during the launching of a submarine. United States v. Aarons, 310 F.2d 341 (2d Cir. 1962). When requested by the Coast Guard, Navy personnel can enforce security zone regulations. The Captain of the Port "may enlist the aid and cooperation of Federal, State, county, municipal, and private agencies to assist in the enforcement of regulations issued pursuant to this part." For Navy personnel, enforcement authority includes the right to forcibly bar entry or reentry and to forcibly eject violators. Navy personnel do not have arrest authority. The Posse Comitatus Act is not a bar to enforcement by Navy personnel. Coast Guard personnel and U.S. marshals can enforce security zone regulations.

E. Defensive Sea Areas. A defensive sea area is a restricted area established by Executive Order issued by the President pursuant to 18 U.S.C. § 2152. Violations are punishable as felonies. The President's power to establish defensive sea areas is not limited to times of actual or threatened war. Feliciano v. United States, 422 F.2d 943 (1st Cir. 1970), cert. denied, 400 U.S. 823. Detailed regulations concerning defensive sea areas are contained in 32 C.F.R. § 761. Of the eleven existing defensive sea areas, all restrictions pertaining to four of these areas have been suspended indefinitely. 32 C.F.R. § 761.4(d). The only defensive sea areas with currently unsuspended restrictions are: Guantanamo Bay; Kaneohe Bay; Pearl

Harbor; Johnston Island; Ringman Reef; Midway Island; and Wake Island. For a detailed discussion of this topic, see Woods, State and Federal Sovereignty Claims over Defensive Sea Areas in Hawaii, 39 Naval L. Rev. 129 (1990). SECNAV has control over the entry of persons and ships into defensive sea areas. 32 C.F.R. 761.3(a). Naval personnel, when so empowered by CNO, have the power to enforce regulations pertaining to defensive sea areas. This includes the authority to physically bar entry or reentry, and to forcibly eject violators. Navy personnel may detain violators but do not have arrest powers. The Posse Comitatus Act does not bar enforcement; Coast Guard personnel and U.S. marshals can enforce defensive sea area regulations.

4109 MILITARY PROTECTIVE ORDERS. Military protective orders (MPOs) may be directed to military members and may be broad in scope since members are subject to military orders. Directives to civilians are limited to orders commensurate with the commanding officer's authority to maintain security and control the activities of employees, residents, and guests on the installation. These include debarment orders, employer directives, and housing area directives. Orders may be given directly affecting civilians to protect them from harm. Specifically, commanding officers may issue orders removing from the home children who are in danger of serious harm. Orders should designate homes or other secure locations to ensure safety. Commanding officers should seek the advice and assistance of local family advocacy team members since family violence ignores traditional professional borders. Health care professionals, social workers, law enforcement personnel, and attorneys will all play a significant role. Early intervention and cooperation is essential.

A. Nature and Purpose. MPOs are similar to civilian temporary restraining orders (TROs). They may be ex parte, that is issued after hearing only one side of the story, if the issuing authority considers it necessary to ensure the safety and security of persons for whom the command is responsible. If ex parte, their duration should be as short as possible to ensure safety, normally not more than ten days. If a longer duration is required, the individual should be given an opportunity to be heard and to respond to allegations. In cases not requiring ex parte determinations, a person should be given the opportunity to be heard and to respond before being given a MPO. Formal hearings are not required. MPOs are based upon a balancing of interests. The greater the crisis and the need to protect, the greater the need to move quickly and to focus on the safety of the persons needing protection. As the crisis abates and long term solutions are considered, the greater the need for considering the rights of all persons involved.

B. Contents. An MPO may specify a finite duration or that it remains in effect until further notice by the issuing authority. MPO provisions may include:

1. Direction to refrain from contacting, harassing, or touching certain named persons;

2. Direction to remain away from certain specified areas, i.e., the home, places of spouse's employment, schools, and day care centers;
3. Direction to do or refrain from doing certain acts or activities.

C. Form. MPOs need not be in writing; however, to avoid confusion and misinterpretation, written orders are recommended. If written, orders should not be placed in personnel service records, although the factors surrounding the orders may be. The following format is recommended, but not required.

MILITARY PROTECTIVE ORDER

From: Commanding Officer

To:

Via:

Subj: MILITARY PROTECTIVE ORDER ISSUED TO _____
CONCERNING ALLEGATIONS OF CHILD/SPOUSE ABUSE

Ref: (a) SECNAVINST 1752.3 (series)

1. You are hereby directed to abide by and obey the following Military Protective Order, issued under reference (a). Violation of this order may result in administrative action or disciplinary action under the Uniform Code of Military Justice.

2. This order is strictly an administrative action to ensure the safety and security of the person(s) listed below. It is also intended to protect you from further allegations concerning family abuse while the order is in effect. This order is not the beginning of disciplinary action against you, nor does it mean that you can not or will not be punished for any actions taken before or after its issuance.

3. This order is issued concerning your association and contact with the following person(s):

4. You are directed to:

5. This order shall remain in effect until [date][not later than ten days after issuance] [unless sooner canceled by me or higher authority].

Signature

4110 **TRAFFIC REGULATIONS.** The Navy's traffic-safety program was recently revised with the promulgation of OPNAVINST 5100.12F on 20 July 1990. The major changes in the instruction which may be of interest to the SJA are listed below, followed by the applicable paragraph number.

A. Alcoholic Beverages. "While on any DoD installation, the operator/passenger(s) of a motor vehicle are prohibited from having open containers of alcoholic beverages in their possession." (Paragraph 12).

B. Radar Detection Devices. "The use of radar detection devices to indicate the presence of speed recording instruments or to transmit simulated erroneous speeds is prohibited on DoD installations." (Paragraph 13).

C. Motorcycles. "Each operator of a motorcycle shall successfully complete the Motorcycle Safety Foundation's Motorcycle Rider Course -- Riding and Street Skills or other training approved by the Naval Safety Center. Each operator of an all-terrain vehicle shall successfully complete the All-Terrain Vehicle Safety Institute ATV Rider Course or other training approved by the Naval Safety Center. [Paragraph 2.b. of enclosure (1)]. Specific courses for motorcycles and ATVs are identified as approved courses.

1. Motorcycle Protective Clothing. In addition to a helmet, eye protection and hard-soled shoes with heels, the following personal protective clothing is required: "Properly worn long-sleeve shirt or jacket, long-leg trousers and full-finger leather or equivalent gloves. [Paragraph 2.e.(3) of enclosure (1)].

2. Safety Vest. "Properly worn (as an outer garment) yellow or orange vest with 1 1/2 to 2-inch-wide vertical or horizontal retro-reflective strips front and back." [Paragraph 2.e.(5) of enclosure (1)].

3. Operator Licensing. "Where state or local laws require special licenses to operate privately owned motorized bicycles (mopeds), motor scooters and all-terrain vehicles, such license requirements at a minimum shall apply to operation of those vehicles on naval stations." [Paragraph 2.f. of enclosure (1)].

4. Motorcycle Rear-View Mirrors. "Government-owned (non-tactical) and privately owned motorcycles, motor scooters, mopeds and all-terrain vehicles operated on naval stations shall not be operated without a rear-view mirror mounted on each side of the handlebars." [Paragraph 2.h. of enclosure (1)].

D. Driver improvement. American Automobile Association's Driver Improvement Program instructors shall not instruct unless they have been recertified within the previous three years. [Paragraph 3.b. of enclosure (1)].

E. Emergency Vehicle Operators. "Individuals shall not be assigned as a driver of Navy police vehicles, ambulances, fire trucks and crash-and-rescue vehicles until they have successfully completed the national Highway Traffic Safety Administration's Emergency Vehicle Operator Course (EVOC). ... Operators shall complete this training every three years thereafter to ensure competency in the safe operation of such vehicles. EVOC instructors shall not instruct unless they have been recertified within the previous three years." [Paragraph 3.c.(1) of enclosure (1)].

F. High Mishap Incidence Locations. "Military police and safety organizations will present this data to installation organizations responsible for highway design, construction, maintenance and traffic engineering for the purpose of analysis and initiation of appropriate improvements. This data will be provided to the Military Traffic Management Command." [Paragraph 7.b(3) of enclosure (1)].

G. Joggers. "Personnel are not authorized to jog on roads and streets on naval installations during peak traffic periods or at nighttime. [Peak traffic periods for the locale shall be defined and published by local commanders.] Personnel shall use sidewalks or jogging paths when available and avoid roads and streets if possible. If using roadways, personnel should jog facing traffic, wear light-colored clothing [during reduced visibility conditions, wear reflective clothing] and obey traffic rules and regulations. Joggers should be cautious of cars entering the roadway from cross streets or driveways." [Paragraph 10.a of enclosure (1)].

4111 **LOSS OF DRIVING PRIVILEGES** The inherent authority of an installation commander to provide for the health, welfare, safety, and security of the command includes the implicit authority to regulate the operation of motor vehicles on that installation. That authority may be affected, however, by the class or category of the person involved, e.g., servicemember, dependent, civilian employee, or civilian visitor, and the nature of the installation, e.g., controlled or limited access or open to the general public. At a controlled access installation, the commander administratively withhold on base driving privileges as a valid nonpunitive measure against those subject to the UCMJ. Exercising the authority to withhold a privilege must not be arbitrary or capricious, and the privilege to be withheld should be logically related to the conduct or behavior to be corrected or prevented. The military commander must also have a legitimate interest in controlling or preventing that conduct or behavior. Adequate due-process protections must be afforded.

A. Authority. Article 0824, U.S. Navy Regulations, 1990, imposes the responsibility on commanding officers to conduct a rigorous program to prevent the illegal introduction, transfer, possession, or use of marijuana, narcotics, or other controlled substances and to exercise utmost diligence in preventing illegal importation of those substances on board his command. This article articulates the installation commander's legitimate interest in preventing introduction and use of drugs and controlled substances on that installation. Consequently, using a motor vehicle on a military installation either as a means of introducing prohibited

substances onto the installation, or as a place where prohibited substances may be transferred, possessed, or used on the installation may legitimately result in that vehicle being barred through the exercise of the commander's authority to withhold or rescind the privilege of registering the vehicle and allowing base access. Whether the privilege should be withheld or rescinded in any particular case may depend upon the vehicle owner's actual involvement in or knowledge of the use of his or her vehicle for the illegal purpose as well as other variable factors.

B. Vehicles and Drug Use. Suspending or revoking a servicemember's privilege to operate a motor vehicle on the installation may also be a valid exercise of command authority where the particular circumstances involve the actual operation of a vehicle by that servicemember in furtherance of the introduction, transfer, use, or possession of a prohibited substance on the installation. To the extent that any vehicle owner or passenger may be involved in the introduction, transfer, use or possession of illegal substances without actually operating the vehicle, no logical relationship between that activity and the holding of an operator's permit is apparent on those facts alone, and withholding or rescinding that privilege would not be supportable as a valid nonpunitive measure under those circumstances. Likewise, withholding or rescinding either the registration of a motor vehicle or an individual's authorization to operate a motor vehicle on the installation would be improper when there is no factual or logical connection between the motor vehicle or its operation and the commission of drug-related offenses. A bar order or a limited bar order under the authority of 18 U.S.C. § 1382 may be a more appropriate remedy in such cases depending on the status of the person (e.g., visitor, etc.) and their legitimate reasons for being on the installation.

C. Seizure. Additional action involving the vehicle may be taken in some cases by referring the matter to the appropriate Drug Enforcement Administration (DEA) office. Regional Administrators of that agency have been designated as custodians to receive and store all property seized pursuant to the Controlled Substances Act, specifically, 21 U.S.C. § 881 [21 C.F.R. § 1316.73 (1981)]. That section provides, generally, for the forfeiture of all vehicles, subject to certain exceptions, that are used to transport or to facilitate the transportation, sale, receipt, possession, or concealment of controlled substances that have been acquired in violation of the Controlled Substances Act (21 U.S.C. §§ 801-904). The rules implementing 21 U.S.C. § 881 indicate that any special agent of the DEA may adopt a seizure initially made by any other officer or by a private person. 21 C.F.R. § 1316.71(d) (1981). As a practical matter, adoption seizures are governed by several case-by-case considerations, such as the quantity and identity of the controlled substances, the value of the vehicle, and a basis to believe that the vehicle will be used illegally again. Although forfeiture may not be available in every instance, the DEA Resident Agent in Charge should be consulted if the other alternatives are deemed inadequate.

CHAPTER 42

RELATIONS WITH CIVIL AUTHORITIES

4201 REFERENCES

- A. JAG Manual, Chapter VI
- B. SECNAVINST 5820.8
- C. SECNAVINST 5822.2

4202 DELIVERY OF PERSONNEL

A. Federal Civil Authorities. Members of the armed forces will be released to the custody of federal authorities (FBI, DEA, etc.) upon request by a federal agent. The only requirements which must be met by the requesting agent are that the agent display both proper credentials and a federal warrant issued for the arrest of the servicemember. The command should consult a Navy or Marine judge advocate before delivery, if reasonably practicable. JAG Manual § 0608.

B. State Civil Authorities. Procedures that are to be followed when custody of a member of the naval service is sought by state, local, or U.S. territorial officials depend on whether the servicemember is within the geographical jurisdiction of the requesting authority. As when custody is requested by Federal authorities, the requesting agent must not only identify himself through proper credentials but must also display the actual warrant for the servicemember's arrest.

1. Delivery Agreement. State, local, and U.S. territory officials must sign a delivery agreement providing for the no-cost return of the servicemember after civilian proceedings have terminated. JAG Manual § 0603. State officials completing the agreement must show their authorization to bind the state to the terms of the agreement. A sample agreement appears in appendix A-6-b of the JAG Manual and at the end of this chapter for downloading convenience.

2. Extradition. If the member is stationed in the United States but outside the territorial jurisdiction of the requesting authority, the member must be informed of his right to require extradition. If (after consultation with a judge advocate or civilian legal counsel) the servicemember waives extradition in writing, the servicemember may be released without an extradition order. If the member does not waive extradition, the requesting state officials must obtain a local arrest warrant. If the local jurisdiction requests delivery of a servicemember wanted by

another state (usually based upon a fugitive warrant or other process from authorities of the other state), the member will normally be released, provided all the requirements discussed above are met. The member will then have the opportunity to contest extradition within the courts of the local state. JAG Manual, § 0604. In any event, release under these conditions can be made by an officer exercising general court-martial jurisdiction (GCMA), someone designated by him, or any commanding officer after consultation with a judge advocate of the Navy or Marine Corps. JAG Manual, § 0604.

3. Overseas. If the member to be arrested is overseas or is deployed and is sought by U.S., state, territory, commonwealth, or local authorities, the request must be made by the Department of Justice or the governor of the state addressed to SECNAV (JAG). If received by the command, it must be forwarded to JAG. The request must allege that the member is charged, or is a fugitive from that state, for an extraditable crime. When all the requirements are met, SECNAV will authorize the member's transfer to the military installation in the United States most convenient to the Navy, where he will be held until the requesting authority is notified and complies with the provisions of JAG Manual, § 0605.

C. Restraint of Military Offenders for Civilian Authorities. Under R.C.M. 106, a servicemember may be placed in restraint by military authorities for civilian offenses upon receipt of a warrant for the member's apprehension or upon receipt of information establishing probable cause that the servicemember committed an offense, AND upon reasonable belief that such restraint is necessary under the circumstances. Such restraint may continue only for such time as is reasonably necessary to effect the delivery; if the civilian authorities are slow in taking custody, the restraint must cease. For delivery of a servicemember to foreign authorities, consult the applicable treaty or SOFA. This provision does not allow the military to restrain a servicemember on behalf of civilian authorities pending trial.

D. Circumstances in which Delivery is Refused.

1. Member Pending Court-Martial. If a servicemember is alleged to have committed several offenses -- including major federal offenses and serious, but purely military, offenses -- and delivery is requested, the military offenses may be investigated and the accused servicemember retained for prosecution by the military. Refusal of delivery must be reported immediately to OJAG and the GCMA. JAG Manual, § 0610. When military disciplinary proceedings are pending, guidance from a judge advocate of the Navy or Marine Corps should be obtained, if reasonably practicable, before delivery to Federal, state, or local authorities.

2. Sentenced Members. Where a servicemember is serving the sentence of a court-martial, the delivery of the servicemember to civil law enforcement authorities is governed by JAG Manual, § 0613. If a request for delivery from civil authorities properly invokes the Interstate Agreement on Detainers Act, the

Department of the Navy, as an agency of the Federal Government, shall comply with the Act. The Act is designed to avoid speedy-trial issues and to aid in rehabilitation efforts by securing a greater degree of certainty about a prisoner's future. The Act provides a way for a prisoner to be tried on charges pending before state courts, either at the request of the prisoner or the state where the charges are pending. When refusal of delivery under Art. 14, UCMJ, is intended, comply with JAG Manual, § 0610d.

3. Extraordinary Circumstances. If a commander considers that extraordinary circumstances exist, delivery may be denied by JAG Manual, § 0610b(2). This provision is rarely invoked.

4. Reporting. In any case where it is intended that delivery will be refused, the commanding officer shall report the circumstances to the Judge Advocate General and the area coordinator by message (or by telephone if circumstances warrant). The initial report shall be confirmed by letter setting forth a full statement of the facts. JAG Manual, § 0610d, app. A-6-c.

DELIVERY AGREEMENT

In consideration of the delivery of _____,
(name of person delivered)

United States Navy (United States Marine Corps), to _____

_____, at _____, for trial upon the charge of

_____, I hereby agree pursuant to the authority vested in me

as _____ that _____, United States Navy

(United States
(name of person delivered)

Marine Corps) will be transported to the State of _____ without expense

to him or the United States and that the Commanding Officer of the _____ -

_____ will be notified immediately of the outcome of the trial and that the said

_____, will be returned to the _____, (name of person
delivered)

or to such place as the Secretary of the Navy shall designate, or transportation issued thereto, without expense to the United States or to the person delivered immediately upon dismissal of the charges or completion of the trial in the event he is acquitted, or immediately upon satisfying the sentence of the court in the event he is convicted and a sentence imposed, or upon disposition of the case, provided that the Department of the Navy shall then desire his return.

SAMPLE MEMORANDUM WHERE DELIVERY IS REFUSED

From: Commanding Officer
To: Judge Advocate General

Subj: DELIVERY REFUSED TO _____ AUTHORITIES; CASE
OF [RANK, FULL NAME, SOCIAL SECURITY NUMBER, U.S. NA-
VY/MARINE CORPS (RESERVE)]

Ref: (a) (Telephone call/message notification to JAG)
(b) JAG Manual § 0610

Encl: (1) Copy of warrant of arrest of _____

1. As reported by reference (a), and per reference (b), report is made that upon presentation of a valid warrant of arrest charging violation of [crime charged], [name of accused] was refused delivery to [sheriff, etc., of county, State, etc.] on [date] because [explain extraordinary circumstances].
2. Enclosure (1) is forwarded for information.

By direction

Copy to:
COMNAVMILPERSCOM/CMC (Code JAM-1)

WAIVER OF EXTRADITION

"I, _____, United States Navy (United States Marine Corps), having been advised of my rights to formal extradition as provided for in sections 0604 JAG Manual by

_____ of _____
(name of military or civilian attorney) (address of attorney)

_____, waive such rights and agree to
accompany _____, a representative of the State of
_____, into the territorial limits of said State. I have been advised that
the crime which I am charged to have committed in the State of _____ -
_____ is as follows:

(Signature)

WITNESSED:

(Signature of witness)

4203 RECOVERY OF MILITARY PERSONNEL FROM CIVIL AUTHORITIES.

Generally, civil authorities will be able to arrest and detain servicemembers for criminal misconduct committed within their territorial jurisdiction and proceed to a final disposition of the case without interference from the military. Military authorities have no legal right or power to interfere with the civil proceedings.

A. Official Duty Exception. No state authority may arrest or detain for trial a servicemember for a violation of state law done necessarily in the performance of official duties. This exception arises from the concept that, where the Federal Government is acting within an area of power granted to it by the Constitution, no state government has the right to interfere with the proper exercise of the Federal Government's authority. It follows that members of the armed forces acting pursuant to lawful orders or otherwise within the scope of their official duties are not subject to state authority. This freedom from interference by the state applies only when the proper performance of a military duty requires violation of a state law.

1. Whenever an accused is in the custody of civil authorities charged with a violation of local or state criminal laws as a result of the performance of official duties, the commanding officer should make a request to the nearest U.S. attorney for legal representation via the area coordinator and SJA or NLSO, if practicable.

2. A full report of all circumstances surrounding the incident and any difficulties in securing the assistance of the U.S. attorney should be forwarded to OJAG. Where the U.S. attorney declines or is unable to provide legal services, advise OJAG in writing. In those cases in which the date set by the court for answer or appearance is such that time does not permit this communication through the usual methods, contact Code 34 by phone, AV 221-9870.

B. Local Agreements. In many areas where major naval installations are located, arrangements have been made between naval commands and the local civilian officials regarding the release of servicemembers to the military before trial. These agreements are local and informal. There is no established Navy-wide procedure, and their success depends solely upon the practical relationships in the particular area. All commands within the area must comply with the local procedures and make such reports as may be required. Normally, details of the local procedures can be obtained from the area shore patrol headquarters, base legal officer, staff judge advocate, or similar official.

C. Command Representatives. The command does not owe legal advice to an accused held by civil authorities in the United States and should not take any action which could be construed as providing legal counsel to represent an accused. The command, however, may send a representative to contact the civil authorities for

the purpose of obtaining information for the command. This representative may provide information to the court, prosecutor, or defense counsel concerning the accused's military status, the quality of his service, and any special circumstances that may aid the civil authorities in reaching a just and proper result; however, care must be taken not to violate the Privacy Act.

D. Conditions on Release

1. If the member is released on his personal recognizance or on bail to guarantee his return for trial, the command may receive the servicemember. The commanding officer, upon verification of the attending facts, date of trial, and approximate length of time that should be covered by leave of absence, should normally grant liberty or leave to permit appearance for trial. JAG Manual, § 0611. Personal recognizance is an obligation of record entered into before a court by an accused in which he promises to return to the court at a designated time to answer the charge against him. Bail involves the accused's providing some security beyond his mere promise to appear at the time and place designated and submit himself to the jurisdiction of the court. Service in the armed forces does not release an accused of the duty to conform to the requirements of release on bond or recognizance.

2. There is no authority for accepting an accused subject to any conditions whatsoever. Commands may inform civilian authorities of the Navy's customary policy of granting leave or liberty to permit attendance at civilian trials, but Navy policy is to permit servicemembers to attend their trials, not to compel that attendance. JAG Manual § 0611. Further, military authorities are without power to place an accused in any sort of pretrial restraint based on the civilian charges. Members can not be accepted from civil authorities on the condition that disciplinary action will be taken against him. Issues such as accuser concepts or selective prosecutions could preclude command action.

4204 **MOU WITH LOCAL AUTHORITIES.** Local authorities frequently provide law enforcement assistance to military installations for various purposes, such as responding to civilian demonstrators. It is helpful if details on such assistance are contained in a memorandum of understanding (MoU). The MOU should provide that nothing contained therein will limit the statutory authority and functions of any Federal agency. Notwithstanding any MOU, a base commander has the authority under the Supremacy Clause of the Constitution to exclude or limit access by state and local law enforcement officials if there is a legitimate security need.

4205 **SPECIAL SITUATIONS**

A. Interrogation by Federal Civil Authorities. Requests to interrogate suspected military personnel by the FBI or other FEDERAL civilian investigative agencies should be promptly honored. Any refusal and the reasons therefor must be reported immediately to OJAG. JAG Manual § 0612.

B. Writs of Habeas Corpus or Temporary Restraining Orders. Upon receipt of a writ of habeas corpus, temporary restraining order or similar process, or notification of a hearing on such, the nearest U.S. attorney should be immediately

notified and assistance requested. A message or telephone report of the delivery of the process or notification of the hearing must be made to SECNAV (JAG) and confirmed by speed letter. An immediate request for assistance is necessary because such matters frequently require a short-fuzed court appearance with an appropriate response by the government. When the hearing has been completed and the court has issued its order in the case, a copy of the order should be promptly forwarded to the OJAG. JAG Manual § 0615.

C. Consular Notification. Within the territory of the United States, whenever a foreign national who is a member of the U.S. armed forces is apprehended under circumstances likely to result in confinement or trial by court-martial, or is ordered into arrest or confinement, or is held for trial by court-martial with or without any form of restraint, or when court-martial charges against him are referred for trial, notification to his nearest consular office may be required. Advise the foreign national that the consul will be notified unless he objects. If the member objects, JAG will determine whether an applicable international agreement requires notification irrespective of the member's wishes. SECNAVINST 5820.6 series provides guidance and details on consular notification.

4206 **SERVICE OF PROCESS AND SUBPOENAS.** Service of process establishes a court's jurisdiction over a person by the delivery of a court order to that person advising him of the subject of the litigation and ordering him to appear or answer the plaintiff's allegations within a specified period of time or else be in default. Properly served, the process makes the person subject to the jurisdiction of a civil court.

A. Overseas. A servicemember's amenability to service of process issued by a foreign court depends on international agreements (such as the NATO SOFA). Where there is no agreement, guidance should be sought from the Judge Advocate General. JAG Manual § 0616a(2).

B. Within the United States.

1. Within the Jurisdiction of the Issuing Court. The commander shall permit the service except in unusual cases where compliance with the mandate of the process would seriously prejudice the public interest. Personnel serving on a vessel within the territorial waters of a state are considered within the jurisdiction of that state for the purpose of service of process. Process should not be allowed within the confines of the command until permission of the commanding officer has been obtained. Where practicable, the commanding officer shall require that process be served in the presence of the commanding officer or another designated officer. Commanding officers are required to ensure that the nature of the process is explained to the member. This can be accomplished by a legal assistance officer. JAG Manual § 0616a.

2. Beyond the Jurisdiction of the Issuing Court. Commanders will permit the service under the same conditions as within the jurisdiction but shall ensure that the member understands that he need not indicate acceptance of service. Avoid bringing the member and process server together in jurisdictions which deem service satisfied by that action, regardless of the member's refusal to accept service. The commander should advise the person concerned to seek legal counsel. When process is mailed to the commander with the request that it be delivered to a person within the command, it may be delivered if the member voluntarily agrees to accept it. When the member does not voluntarily accept the service, the process should be returned with a notation that the named person has refused to accept it. JAG Manual § 0616a(2).

C. Arising from Official Duties. Whenever a servicemember or civilian employee is served with Federal or state court civil or criminal process arising from activities performed in the course of official duties, notify the commanding officer and provide copies of the process and pleadings. The command shall ascertain the pertinent facts, coordinate with the local NLSO/SJA to notify JAG (Code 34) immediately by telephone, and forward the pleadings and process to that office. JAG Manual § 0616b. See "Personal Liability" in this Deskbook.

D. Service Not Allowed. In any case where the commander refuses to allow service of process, report the matter to SECNAV (JAG) as expeditiously as the circumstances allow. JAG Manual § 0616e.

E. Leave or Liberty. In those cases where personnel either are served with process or voluntarily accept service of process, leave or liberty should be granted to comply with the process, unless it will prejudice the best interests of the naval service. JAG Manual § 0616d.

4207 SUBPOENAS. A subpoena is a court order requiring a person to testify in either a civil or criminal case as a witness. The same considerations exist in this instance as apply in the case of service of process, except for special rules where testimony is required on behalf of the United States in criminal and civil actions, or where the witness is a prisoner.

A. Witness on behalf of the Federal Government. Where DoN interests are involved and departmental personnel are required to testify for the Navy, NMPC or CMC will direct the activity to which the witness is attached to issue TAD orders. Costs of such orders shall be borne by that same command. If DoN interests are not involved, the member's command will issue orders and the Navy will be reimbursed by the Federal agency concerned. JAG Manual § 0618a.

B. Witness on Behalf of Accused in Federal Court. When members are served with a subpoena and the appropriate fees and mileage are tendered, commanders should issue no-cost permissive orders unless the public interest would

be seriously prejudiced by the member's absence from the command. In those cases where fees and mileage are not tendered as required by the Federal Rules of Criminal Procedure, but the person subpoenaed still desires to attend, the commanding officer is authorized to issue permissive orders at no cost to the government. The individual should be advised that an agreement as to reimbursement for any expenses should be effected with the party desiring their attendance and that no reimbursement should be expected from the government. JAG Manual § 0618b.

C. Witness in an Action with No Federal Government Interest. The commander normally will grant leave or liberty to the person, provided such absence will not prejudice the best interests of the naval service. If the member is being called as a witness for a nongovernmental party only because of performance of official duties, the commander is authorized to issue the member permissive orders at no expense to the government. JAG Manual § 0618b.

D. Prisoner Witnesses. SECNAV (JAG) will normally be grant permission for a prisoner to testify in another criminal case. Prisoners will not be released, however, to appear as a witness in a civil action, regardless of whether it is a federal or state court making the request. A deposition may be taken at the place of confinement subject to reasonable conditions and limitations imposed by the prisoner's command. JAG Manual § 0619.

E. Pretrial interviews concerning matters arising out of official duties. Requests for interviews or statements by parties to private litigation must be forwarded to the cognizant NLSO or Marine SJA. When practicable, arrangements will be made to have all such individuals interviewed at one time by all interested parties. These interviews will be conducted in the presence of an officer designated by the NLSO of Marine SJA who will ensure that no line of inquiry is permitted which may disclose or compromise classified information or otherwise prejudice U.S. security interests. These requests will not be granted where the United States is a party to any related litigation or where its interests are involved. Where U.S. interests are involved, records and witnesses shall be made available only to federal agencies. JAG Manual § 0620.

4208 **RELEASE OF OFFICIAL INFORMATION.** SECNAVINST 5820.8 series prescribes what information, testimonial and documentary, by military and civilian DoN personnel is releasable to courts and other government proceedings and the means of obtaining approval for releasing such information. The instruction is currently under revision; detailed discussion here will be reserved until that revision is promulgated.

4209 **JURY DUTY.** Active-duty servicemembers are exempted by 28 U.S.C. § 1863(b)(6) from service on Federal juries. Service on state juries is governed by SECNAVINST 5822.2 which implements 10 U.S.C. § 982.

A. Categorical Exemption. SECNAVINST 5822.2 exempts all personnel who:

1. Hold flag or general rank;
2. are in command;
3. are assigned to the operating forces;
4. are in a training status; or
5. are stationed outside the United States.

B. Case-by-Case Exemption. Officers authorized to convene special courts-martial may conclusively declare a servicemember exempt from state or local jury duty when that service would:

1. Unreasonably interfere with the performance of the servicemember's military duties; OR
2. adversely effect the readiness of the member's command.

C. Procedures. The commander notifies the appropriate state official, typically the clerk of court, as soon as the exemption determination is made. Telephonic notification should be confirmed in writing. Commanders who do not have special court-martial convening authority are required to forward the request, with a recommendation and supporting justification, to the next superior in the chain of command who is authorized to make an exemption determination or to the area coordinator. If members serve on a jury, they shall not be charged leave or lose pay. All fees, with the exception of actual expenses, will be turned over to the U.S. Treasury.

POSSE COMITATUS

4210 POSSE COMITATUS REFERENCES

- A. Posse Comitatus Act, 18 U.S.C. § 1385
- B. Military Cooperation with Civilian Law Enforcement Officials, 10 U.S.C. §§ 371-380
- C. DoD Directive 5525.5 of 21 Feb 1986, DoD Cooperation with Civilian Law Enforcement Officials

- D. SECNAVINST 5820.7B, Subj: Cooperation with Civilian Law Enforcement Officials

4211 PURPOSE AND SCOPE

- A. The Posse Comitatus Act (PCA) provides that:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years or both.

B. At the time of its enactment in 1878, the PCA was intended to prohibit the use of Union forces in the enforcement of law against civilians. The statute has evolved into a general prohibition against civil use of the military. Although not expressly applicable to the Navy and Marine Corps, the PCA is regarded as a statement of federal policy which has been adopted by DoN in SECNAVINST 5820.7B.

C. The prohibitions are applicable to active duty members of the Navy and Marine Corps acting in an official capacity. Accordingly, the policy does not apply to:

1. A servicemember off duty, acting in a private capacity, and not under the direction, control or suggestion of DoN authorities;
2. a member of a Reserve component not on active duty or active duty for training;
3. civilian special agents of the Naval Investigative Service performing assigned duties under SECNAVINST 5520.3 series; or
4. military forces outside the jurisdiction of the United States.

4212 DIRECT PARTICIPATION PROHIBITED. Military personnel are prohibited from providing the following forms of direct assistance:

- A. Interdiction of a vehicle, vessel, aircraft, etc.;
- B. a search or seizure;
- C. an arrest, stop and frisk, or similar activity;
- D. use of military personnel for surveillance or pursuit of individuals, or as informants, undercover agents, investigators, or interrogators; and

E. any other activity which subjects civilians to the exercise of military power that is regulatory, proscriptive, or compulsory in nature.

4213 EXCEPTIONS

A. Express Statutory Authority. Some laws permit direct military participation in civilian law enforcement, including: suppression of insurrection or domestic violence [10 U.S.C. §§ 331-334(1982)], protection of the President, Vice President and other designated dignitaries [18 U.S.C. § 1751 (1982)], assistance in the case of crimes against members of Congress [18 U.S.C. § 351 (1982)], and foreign officials and other internationally protected persons [18 U.S.C. §§ 112, 1116 (1982)]. Additional exceptions are listed in paragraph 9a(2)(f) of SECNAVINST 5820.7B.

B. Drug Interdiction. Under 10 U.S.C. § 124, DoD is the lead federal agency for detecting and monitoring aerial and maritime transportation of illegal drugs into the United States. In the National Defense Authorization Act for 1990 and 1991, Congress directed DoD to conduct training exercises in known drug-interdiction areas to the maximum extent possible. Any vehicle or aircraft used for transporting drugs and seized for a legitimate military purpose is subject to forfeiture by the Drug Enforcement Administration under 21 U.S.C. § 881(a)(4).

C. Military Purpose Doctrine. Actions taken for the primary purpose of furthering a military or foreign affairs function of the United States (e.g., enforcement of the UCMJ, maintenance of law and order on a military installation, protection of classified military information or equipment) are not restricted by the PCA regardless of incidental benefits to civilian law enforcement authorities.

1. Use of Information. All information collected during the normal course of military operations which may be relevant to a violation of Federal or state law shall be forwarded to the local Naval Investigative Service field office or other authorized activity for dissemination to appropriate civilian law-enforcement officials pursuant to SECNAVINST 5320.3 series.

2. Training and Operations. The planning and execution of compatible military training and operations may consider the needs of civilian law-enforcement officials for information when the collection of information is an incidental aspect of training performed for a military purpose. The needs of civilian law-enforcement officials may even be considered in scheduling routine training missions. Missions cannot, however, be planned or created for the primary purpose of aiding civilian law-enforcement officials or to routinely collect information about U.S. citizens.

D. Use of Equipment and Facilities. Navy and Marine Corps activities may make available equipment, base facilities, or research facilities to Federal, state or

local civilian law-enforcement officials for law-enforcement purposes when approved by proper authority under paragraph 9e of SECNAVINST 5820.7B. Equipment cannot be lent if the loan will adversely affect national security or military preparedness.

1. Operation and Maintenance of Equipment. Where the training of non-DoD personnel is infeasible or impractical, Department of the Navy personnel may operate or maintain, or assist in operating or maintaining, equipment made available to civilian law-enforcement authorities. The request for assistance must come from agencies such as the Drug Enforcement Administration, Customs Service, or Immigration and Naturalization Service.

2. Emergencies. In an emergency situation determined to exist by SECDEF and the Attorney General, those agencies identified above may use DoN vessels and aircraft outside the land area of the U.S. as a base of operations to facilitate the enforcement of laws administered by those agencies, so long as such equipment is not used to interdict or interrupt the passage of vessels or aircraft.

E. Training and Expert Advice. Navy and Marine Corps activities may provide training on a small scale and expert advice to federal, state and local civilian law-enforcement officials in the operation and maintenance of equipment.

G. Secretarial Authorization. The DoN policy is subject to such exceptions as SECNAV may make on a case-by-case basis.

4214 **REIMBURSEMENT.** As a general rule, reimbursement is required when equipment or services are provided to agencies outside DoD. When DoN resources are used in support of civilian law-enforcement efforts, our expenses shall be limited to the incremental or marginal costs. Forward waiver requests to CNO (OP-642) or CMC (POS), copy to CNO (OP-92)/NAVCOMPT (NCB). Waiver requests may be granted by ASD (FM&P) when: the assistance is incidental to purposeful military activity; the activity provides the Navy with training or operational benefits; reimbursement is not required by law; and a waiver will not adversely affect military preparedness.

A. Reporting. By the 15th of the month following each quarter, Navy and Marine Corps second echelon commands must submit quarterly reports on requests for assistance. The reports indicate the action taken, the costs involved, and other pertinent information. The report is forwarded to CNO (OP-642) or CMC (POS), copy to CNO (OP-92)/NAVCOMPT (NCB). The format in enclosure (1) to SECNAVINST 5820.7B is reproduced in the appendix.

B. Violations. Violators of the PCA are subject to a maximum criminal punishment of two years' imprisonment and a \$10,000 fine. Violators may also be subject to personal civil liability. In addition, courts have hinted that evidence seized

as a result of activities in violation of the PCA may be excluded. U.S. v. Roberts, 779 F.2d 565 (9th Cir. 1986); U.S. v. Walden, 490 F.2d 372 (4th Cir.) cert. denied, 416 U.S. 983 (1974).

SAMPLE FORMAT FOR PREPARING
"REPORT ON SUPPORT TO CIVILIAN LAW ENFORCEMENT"

The quarterly report shall contain the following information for each request considered, whether approved or denied:

1. Number and type of assistance requested.
 - a. Facilities
 - b. Information
 - c. Equipment
 - (1) Aircraft
 - (2) Vehicles
 - (3) Vessels
 - (4) Special (night vision goggles, weapons, etc.)
 - (5) Miscellaneous
 - d. Aviation Mission Support
 - (1) Surveillance
 - (2) Identification aircraft support
 - (3) Logistics
 - (4) Miscellaneous
 - e. Surface Mission Support.
 - (1) Surveillance
 - (2) Ship services (towing, tactical law enforcement teams TACLETs, etc.)
 - (3) Logistics
 - (4) Miscellaneous

- f. Ground-based Mission Support.
 - (1) Radar/Sensor Surveillance
 - (2) Aerostats
 - (3) Transportation
 - (4) Border air and ground surveillance
 - (5) Logistics
 - (6) Miscellaneous
- g. Explosive Ordnance Disposal
- h. Training provided to law enforcement agencies
- i. Personnel
- j. Other support not specifically addressed.

2. The length of time for which assistance is requested, if appropriate (if the request is for information or support for a brief time, enter "NA").

3. Status of the requests:

- a. Number approved.
- b. Number denied.
- c. Number pending.

4. A brief discussion of the reason for any denial.

5. Manhours/mandays expended to support law enforcement agencies.

SAMPLE MOU WITH LOCAL AUTHORITIES

1. **PURPOSE.** The purpose of this Memorandum is to delineate an understanding between the subscribing officials, as representatives of the U. S. Naval Station Ingleside, Texas (NAVSTA Ingleside), the Ingleside Police Department (Police Department), and the San Patricio County Sheriff's Department (Sheriff's Department), relating to: (a) the investigation of offenses potentially of mutual interest to NAVSTA Ingleside and civil authorities; (b) the reporting of certain types of offenses and injuries; (c) arrests effected by the Police Department and the Sheriff's Department on board NAVSTA Ingleside; and (d) response to civil disturbances on or adjacent to NAVSTA Ingleside. Nothing herein shall limit the statutory authority or functions of any Federal agency acting on board NAVSTA Ingleside.

2. **POLICY.** NAVSTA Ingleside, the Police Department, and the Sheriff's Department recognize that proper administration and discipline of the Armed Forces require that, ordinarily, offenses committed by military personnel on NAVSTA Ingleside be investigated and prosecuted by the military. However, there may be occasions when such offenses should be investigated by Texas civil authorities. The procedures set forth herein are intended to make the investigation of offenses more expeditious and efficient while giving appropriate consideration to the requirements of the Armed Forces, the policies of the civil government, and other matters of mutual interest. This Memorandum of Understanding does not apply to offenses cognizable only under the Uniform Code of Military Justice nor does it apply to investigations for administrative or security purposes.

3. **JURISDICTIONAL AREAS.** This Memorandum of Understanding shall address responsibilities for the investigation of offenses committed within the geographic area of NAVSTA Ingleside, where it is understood the United States maintains a proprietary interest only.

4. **INVESTIGATIONS.** The following principles shall be applied in determining whether NAVSTA Ingleside, the Police Department, the Sheriff's Department, or the Naval Investigative Service (NIS) will conduct a particular investigation. Decisions to assume or decline jurisdiction shall be made promptly so that items of evidentiary value will not be lost or destroyed.

A. Offenses Committed on NAVSTA Ingleside

1. Traffic Enforcement. NAVSTA Ingleside shall be primarily responsible for traffic control, enforcement of base traffic regulations, and investigation of motor vehicle accidents.

2. Other Misdemeanor Offenses. As used herein, a misdemeanor offense is an offense punishable under the laws of the State of Texas by confinement of one year or less. Investigations of misdemeanor offenses shall be first conducted by the military. If a suspect is not subject to the Uniform Code of Military Justice, and if the matter will not be pursued in any federal court, investigative jurisdiction shall be referred to the Police Department or the Sheriff's Department after the military purpose in conducting such investigation has been satisfied.

3. Felonies. As used herein, a felony is an offense punishable under the laws of the State of Texas by confinement for more than one year. The Naval Investigative Service (NIS) is normally responsible for the investigation of felonies aboard NAVSTA Ingleside. NIS will coordinate with the Police Department or Sheriff's Department whenever investigative matters warrant the attention or assistance of the Police or Sheriff's Department.

B. Offenses Committed Outside Naval Station Ingleside

1. The Police Department or the Sheriff's Department will normally be responsible for the initial investigation of offenses committed outside the Naval Station. However, when it appears a military member may be subject to prosecution under the UCMJ, the Police Department or the Sheriff's Department shall inform NIS of the incident and give them the opportunity to participate in the investigation. Thereafter, the investigation shall be conducted as provided in subsection 4.a. above.

2. Investigations initiated by the military may be pursued by the military to the extent military interests dictate.

3. It is understood that no State has the right or power to interfere with the Federal Government in the proper performance of its authorized functions. Federal supremacy dictates that, among other matters, the Police Department or the Sheriff's Department may not arrest and detain for trial any member or the Armed Forces for alleged violation of Texas law done in the lawful performance of his official duties or done pursuant to lawful orders.

C. Offenses Against the United States. Notwithstanding the other provisions of section 4, above, when it appears that an offense involves fraud against the United States or damage to, or misappropriation or larceny of, United States property, or any violation of the criminal laws of the United States, the investigation shall be conducted by NIS and other appropriate Federal authorities.

5. **DEMONSTRATIONS.** In the event of a demonstration, the following actions will be taken:

A. If the demonstrators are located adjacent to the Naval Station, the Police Department or Sheriff's Department shall normally have cognizance over the arrest

of the demonstrators, if the need arises and Police or Sheriff Department personnel are present. The commanding officer of the Naval Station retains the inherent authority to take the necessary steps to protect the security of his installation.

B. If the demonstrators attempt to enter the Naval Station unlawfully, the Naval Station Security force shall detain the demonstrators until they can be turned over to Police Department or Sheriff's Department personnel. Naval Station Ingleside shall request assistance from the Police Department and Sheriff's Department when necessary. When requested, the Police Department and/or Sheriff's department personnel shall assist in control of demonstrators, including the arrest of demonstrators when necessary.

C. If the demonstrators are physically located on NAVSTA Ingleside, NAVSTA security shall when necessary detain the demonstrators until they can be turned over to Police Department or Sheriff's Department personnel. When necessary, Naval Station Ingleside will request Police Department and/or Sheriff's Department personnel to come on board Naval Station Ingleside to assist in control of such demonstrators, including the arrest of such demonstrators when necessary.

6. REPORTING INJURIES

A. Internal Navy regulations require that when Navy commands are contacted by nonmilitary law enforcement organizations in connection with investigative matters that the matter must be referred to NIS for coordination. Accordingly, any release of information concerning investigative matters must first be coordinated with NIS. If NIS permission is obtained, NAVSTA Ingleside shall immediately report to the Police Department or the Sheriff's Department by telephone, and in writing as soon thereafter as is practicable, the identities of persons involved and circumstances of each occurrence of the following categories of injuries that are treated, or otherwise discovered, by personnel of NAVSTA Ingleside:

1. Injuries to any person inflicted by means of a knife, gun, pistol, or other deadly weapon, in apparent violation of any law of the State of Texas; and

2. All suspected cases of child abuse or sexual molestation of minors within the cognizance of the State of Texas. The above information will not be withheld from the Police and Sheriff's Department unless there is a valid military or investigative reason to do so.

B. The Police Department and the Sheriff's Department shall likewise report to NAVSTA Ingleside the identities of persons involved and circumstances of each occurrence of the following categories of injuries that are discovered by, or become known to the Police Department or Sheriff's Department:

1. Serious injuries to military personnel occurring off base; and.

2. Serious injuries to dependents of military members, assigned to NAVSTA Ingleside, which occur off the base. With regard to these categories of injuries, it is understood that the Police Department or the Sheriff's Department cannot order or instruct the local community hospitals, or any physician, to forward injury reports to NAVSTA Ingleside. However, the Police Department and the Sheriff's Department shall, upon request, provide to NAVSTA Ingleside copies of any such injury reports that may be acquired by the Police Department or Sheriff's Department.

7. ARRESTS ON NAVSTA INGLESIDE

A. Entry on to NAVSTA Ingleside by Police Department or Sheriff's Department personnel will be with the prior permission of the commanding officer or his designated representative.

B. All arrests will be made pursuant to a valid arrest warrant unless otherwise authorized by the commanding officer, executive officer, or their designated representative.

C. When the delivery of any military member or civilian is requested by civil authorities, the person desiring the arrest will bring the arrest warrant to the Security Office. It is understood that the Security Office is required to consult with a judge advocate to determine the validity of the arrest warrant. In the case of a military member, delivery will only be effected upon completion of the agreement contained in Appendix A-6-b of the Manual of the Judge Advocate General, a copy of which is appended to this Agreement for ease of reference. Once the validity of the warrant is established, the warrant will be delivered at a place to be determined by the security officer. Civilians cannot be compelled to report to a designated place for delivery of a warrant.

D. Delivery of a proper warrant may be refused only in the following limited circumstances:

1. Where a military accused is pending trial by court-martial; or
2. When the commanding officer determines that extraordinary circumstances exist which indicate should be refused.

E. The above procedures do not apply to out of state fugitive warrants.

8. PERIOD OF AGREEMENT. The undersigned agree to cooperate fully in carrying out the policies and procedures set forth in the foregoing Agreement, which shall remain in force [for a specified period] commencing on the date last subscribed

below. This Agreement may be modified by mutual consent unilaterally by thirty (30) days written notice by or official or his successor to the other subscribing their successors. The provisions of this Memorandum shall be reviewed every two (2) years with the first to be conducted during November 1992.

[SIGNATURES OF REPRESENTATIVES]

Attachment: Copy of JAG Manual Appendix A-6-b

RESPONDING TO REQUESTS FOR OFFICIAL INFORMATION

1. **POLICY.** Per DoN policy, factual official information, both testimonial and documentary, should be made reasonably available for use in federal, state, and foreign courts unless that information is classified, privileged, or otherwise protected from public disclosure. The litigation interests of the United States will be protected by ensuring that we have adequate knowledge about the pending litigation. SECNAVINST 5820.8 and DoD Instruction 5405.2 buy time to find out what's going on. To this end, only JAG and determining authorities may give permission to release official information in response to a litigation demand. Preserving our "federal sovereign" prerogatives by insisting on substantial compliance with 5820.8 is necessary. The instruction does not control or supersede FOIA, Privacy Act, or other laws affecting the release of official information. It operates independently of them.

2. **WITNESS REQUESTS**

A. **Expert Testimony.** Navy personnel (including civilian employees) will not provide expert or opinion testimony concerning official information for any party except the United States. The only exception occurs when the requester shows "exceptional need or unique circumstances" and the testimony will not be adverse to the Government's litigation interests. Permission to give expert or opinion testimony (at no expense to U.S.) must be in writing from the JAG (or a determining authority if JAG allows).

B. **Factual Testimony.** Members may testify about official factual matters with written or oral permission from a determining authority. A record of oral approval shall be made and retained. If authorized to testify, Navy members, present and former, will only reveal official information relevant to the request approved for release by higher authority.

C. **Subpoenas.** Navy members who are subpoenaed as witnesses who have not been able to get permission to testify or some other form of guidance should go to court with a copy of the instruction, explain the need for prior approval to the judge, and seek a stay. If the judge orders the individual to testify, he should seek guidance from a determining authority. If the determining authority, presumably for good reason, says don't testify, the witness shall "respectfully decline to comply with the demand."

(1) We must not allow Navy witnesses who are permitted to testify to be abused by civilian counsel or state courts.

(2) State process cannot be ignored. Make every effort to get the requesting civilian attorney to comply with our instruction. Document your efforts to be reasonable. If necessary, write to the judge or bring DoD Directive 5405.2 and

SECNAVINST 5820.8 to court and explain why we cannot comply. Have witnesses ready in the event the judge disagrees with our approach.

3. REQUESTS FOR OFFICIAL INFORMATION

A. Normal Circumstances. A proper request for official information should be in writing and contain relevant information from Enclosure (4), but not, of necessity, all 18 items. Use common sense in imposing this requirement on requesters. Record phone calls in which guidance is sought or time problems are foreseen. Inform the local U.S. Attorney and keep the assigned AUSA apprised if the court's exercise of contempt power looms and removal appears necessary.

B. Emergency Circumstances. A proper request should be in writing, but, per DoD Directive 5405.2, an oral request under emergency circumstances can be honored. Emergency circumstances, as explained in paragraph 2a-c of enclosure (4), which are determined to exist in the discretion of the determining authority, justify honoring an oral request followed up by a written request.

CHECKLIST FOR RESPONDING TO REQUESTS FOR OFFICIAL INFORMATION**A. Is the U.S. a party or likely to be?****1. If so, contact the cognizant office:**

Contracts: OGC
Torts: Code 35
Admiralty: Code 31
All Other: Code 34

2. If not, is it a request for an expert witness?**a. If so, refer the request to OJAG/OGC.****b. If not, the Regional Determining Authorities, typically GCMA's, will generally handle.****B. Is the Privacy Act implicated?****1. If so, must have:****a. Judge signed court order; or****b. Written release from person with privacy interest.****C. Is the request in writing?****a. If not, is it an emergency exception?****b. If so, does it comply with enclosure (4) of SECNAVINST 5820.8, i.e., provide adequate information to process?****c. If a subpoena, is it properly served on OGC?****D. Is it a request for records? If so, refer to the cognizant special repository.****1. Former Service Personnel: National Personnel Records Center, 9700 Page Blvd., St. Louis, MO 63132;****2. Pay Records: Navy Finance Center, Code OL, Room 2757, 1240 East 9th St., Cleveland, OH 44419-2055.
POC: Gary Bryant Wolfe at (216) 522-5396.**

3. Medical Records of Active Duty Members
 - a. Release to the member is required under the Privacy Act unless to do so would be injurious.
 - b. Release to third parties is prohibited by the Privacy Act unless there is written permission from the individual or a court order signed by a judge.
4. Civilian Employee Records. Release normally requires a judge-signed court order. See para. 2b(4) of Encl (5). See Doe v. diGenova, 779 F.2d 74 (D.C. Cir. 1985).
5. Classified Records. Release for litigation must be coordinated with OP-09N. See para. 2b(2) of Encl (5). OPO-09N is personified in NSIC's Information and Personnel Security Policy Staff. Call NSIC Legal if this comes up.
6. Unclassified Naval Records. When the requester won't cooperate with SECNAVINST 5820.8, subpoenas are only effective if served on the Secretary of the Navy through his agent, the General Counsel. See 10 U.S.C. § 7861. Treat other subpoenas with deference but obtain compliance with enclosure (4) before voluntarily releasing the information.
7. Affirmative Claims Files. These files can be released by the NLSO CO without demanding compliance with 5820.8.

E. Is it a request for a visit or view? The requester must obtain advance approval from a determining authority. See paragraph 4a(2) of enclosure (3) and paragraph 2d of enclosure (5) regarding the CO's discretion as to time and place.

F. Assuming the request meets all procedural requirements, is release of the information consistent with other concerns and guidance?

1. Is the request unduly burdensome?
2. Would release comport with litigation discovery rules?
3. Would release violate a statute (e.g., Medical Quality Assurance Statute), regulation, or instruction?
4. Would release violate a privilege or reveal classified information?
5. Would release interfere with law enforcement?

G. When in doubt, call Code 34 at AV 221-9870.

CHAPTER 43

FREEDOM OF EXPRESSION

4301 RIGHT TO PEACEABLE ASSEMBLY

A. On Base Demonstrations. A commanding officer should prohibit an on-base demonstration which "could result in interference with or prevention of orderly accomplishment of the mission of the installation, or present a clear danger to loyalty, discipline, or morale of the troops." DoD Directive 1325.6, para. III.E. This test is narrowly drawn, both to protect substantial governmental interests and withstand judicial scrutiny. Prior authorization of an on base demonstration will not shield participants from prosecution for unlawful conduct.

B. Off Base Demonstrations. Commanders may prohibit servicemember participation outright in off-base demonstrations: while the members are "on duty," i.e., during working hours; in a foreign country; when breach of law and order is reasonably anticipated; when violence is likely to result; and when the demonstration involves overtly discriminatory organizations. In addition, the commander can prohibit attendance at an off base demonstration in uniform per DoD Directive 1334.1 series, under the following circumstances: At any subversive-oriented meeting or demonstration; in connection with political activities; and when wearing the uniform would tend to bring discredit to the armed forces or create the appearance that the service endorses the member's attendance.

C. Off Base Gathering Places. Under OPNAVINST 1620.2 and MCO 1620.2 series, armed forces disciplinary control boards, operating under the cognizance of the area coordinator, have the authority to declare places "off-limits" where conditions exist that are detrimental to the good discipline, health, morals, welfare, safety and morale of armed forces personnel. The commanding officer also has authority to act independently in EMERGENCY situations. The Federal courts will consider the decision to declare an establishment "off limits" as final and not subject to review by the courts, providing the command has followed service procedures. Servicemembers frequenting an establishment duly declared "off limits" would be subject to prosecution for violation of a lawful order.

D. Membership in Organizations. Passive membership in any organization by servicemembers cannot be prohibited. Organizational activities (such as distributing of material, recruiting of new members, or an on-base meeting) may, however, be proscribed by a commanding officer when they present a clear danger to installation security, orderly accomplishment of the command's mission, or preservation of morale, discipline, and readiness. Organizations which actively

advocate racially discriminatory policies with respect to their membership (such as the Ku Klux Klan) may be restricted by the commanding officer from forming affiliations aboard a naval ship or shore facility and the attendant solicitation of members.

4302 PRINTED MATERIALS

A. Possession of Printed Materials. Per paragraph III.A.2. of DoD Directive 1325.6, "the mere possession of unauthorized printed material may not be prohibited" Naturally, this broad statement does not permit the unauthorized possession of classified material. Possession of material for the purpose of making an illegal distribution, however, is prohibited; the material may be impounded if the commander determines that an attempt will be made to distribute." Such determinations should be based on probable cause, supported by objective facts, e.g., numerous copies of the same publication.

B. Distribution of Printed Material

1. Official Outlets. Article 4314f of the Navy Exchange Manual contains very broad guidelines for screening pornographic or other materials inappropriate for sale in the military. Commanders are required to apply a consistent standard to all publications. To avoid censorship imbroglios, however, paragraph III.A.1. of DoD Directive 1325.6 prohibits commanders from denying the sale of a specific issue of a publication which is otherwise authorized for distribution through official outlets.

2. Unofficial Outlets. Commanders may require that prior approval be obtained for any distribution on a military installation to determine whether the distribution would: present a "clear danger" to the loyalty, discipline, or morale of military personnel; or "materially interfere" with the accomplishment of a military mission. Local implementing directives must be couched carefully to avoid an attack that the regulation is overbroad. Distributors should be advised that command approval to distribute is neither an endorsement of the publication nor a shield against subsequent punishment for any unlawful actions in connection with the distribution.

4303 ESTABLISHMENT CLAUSE ISSUES. The three-part test developed in Lemon v. Kurtzman, 403 U.S. 602 (1971), is applied to determine whether governmental action has run afoul of the first amendment guarantee of separation of church and state.

A. Criteria. The government action must:

1. Have a secular legislative purpose;

2. have a principal or primary effect that neither advances nor inhibits religion; and
3. not foster an excessive government entanglement with religion.

B. Application. The common application of this test in recent years is evaluating the constitutionality of nativity scenes. These displays may be held lawful under the Lemon test if part of larger display, Lynch v. Donnelly, 465 U.S. 668 (1984), as contrasted with placing the display at an inherently governmental location. American Civil Liberties Union v. City of Birmingham, 791 F.2d 1561 (6th Cir. 1986)(Nativity scene located alone in front of city hall violated the Establishment Clause). For a discussion of religious displays on a military installation, see Jewish War Veterans v. United States, 695 F. Supp. 3 (D.D.C. 1988).

4304 RELIGIOUS ACCOMMODATION

A. References

1. 10 U.S.C. §§ 774, 6031
2. U.S. Navy Regulations, 1990, Article 0817
3. SECNAVINST 1730.8 series
4. DoD Directive 1300.17 series

B. General. Notwithstanding the "establishment clause" of the first amendment and the notion of separation of church and state, federal law provides for a Navy Chaplain's Corps and requires commanding officers to "cause divine services to be conducted on Sunday." The statute, 10 U.S.C. § 6031, also permits chaplains to conduct divine services according to the manner and form of their faiths.

C. Reasonable Accommodation of Religious Practices. The accommodation of a member's religious practice depends upon military necessity, and that determination of military necessity rests entirely with the commanding officer. SECNAVINST 1730.8 provides guidelines to be used by the naval service, in the exercise of command discretion, concerning the accommodation of religious practices. Commanders may accommodate a variety of religious requests, including requests relating to dietary observances, sabbath observances, and religious clothing. Religious jewelry remains subject to pertinent uniform regulations.

D. Religious Apparel. Religious articles which are not visible may be worn with the uniform as long as they do not interfere with the performance of the member's military duties. Religious articles which are visible may be authorized for wear with the uniform if they are neat and discreet and do not interfere with the

proper wearing of the uniform or the member's duty performance. Religious items may not be worn with historical or ceremonial uniforms, while participating in ceremonial details, or during basic military skills training.

E. Factors Bearing on a Request. Commanders may consider:

1. The importance of military requirements, including individual readiness, unit cohesion, health, safety, morale and discipline;
2. the religious importance of the accommodation to the requester;
3. the cumulative impact of repeated accommodations of a similar nature;
4. alternative means available to meet the requested accommodation; and
5. previous treatment of the same or similar requests made for other than religious reasons.

F. Denials. SECNAVINST 1730.8 also provides that any visible item or article of religious apparel may not be worn with the uniform until approved. When a commander denies a religious accommodation request, the member must be advised that he has a right to request a review of the refusal by CNO or CMC. That review will normally occur within 30 days following the request for review for cases arising in the United States, and within 60 days overseas. If accommodation is not in the best interests of the unit and continued tension between the unit's requirements and the individual's religious beliefs is apparent, the command may take administrative action, including reassignment, reclassification or separation.

4305 **WRITING OR PUBLISHING MATERIALS.** Sections 401.2 and 403.4 of the Navy Public Affairs Regulations, SECNAVINST 5720.44A, provide for prior security and policy review of certain materials prepared by naval personnel. Writers must submit their material for review before the manuscript is given to a prospective publisher. The review seeks to prevent the unauthorized release of classified material and to ensure that, if the author purports to state government policy, the policy is stated correctly. Permission to publish is not a grant of immunity. Publication could violate a number of statutes or regulations, depending on its content. For example, Article 1121.2 of U.S. Navy Regulations, 1990, prohibits any public speech or article which is "prejudicial to the interests of the United States." From a standards of conduct perspective, servicemembers may not use government time or resources for personal writing. Conversely, the publication of "underground newspapers" by military personnel off-base, on their own time, and with private resources is not in itself prohibited. See "Standards of Conduct" in this Deskbook for a discussion of honoraria in connection with private writings.

4306 POLITICAL ACTIVITIES

A. References

1. DoD Directive 1344.10 series
2. SECNAVINST 5370.2J
3. MILPERSMAN, art. 6210140.
4. MCO 5370.7 series

B. Scope. Members on active duty, i.e., full-time duty in the active military service for more than 30 days, are prohibited from engaging in partisan political activity. "Partisan political activity" is activity in support of, or related to, candidates representing, or issues specifically identified, with national or state political parties and associated or ancillary organizations. Consult SECNAVINST 5370.2J for a laundry list of political dos and don'ts. Questions recur on the following rules:

1. Members may sign a petition in their private capacity for specific legislative action.
2. A member may write a nonpartisan letter to the editor of a newspaper expressing personal views on public issues.
3. Members may display a political sticker on their private automobile, but not a large political sign.
4. A member may NOT participate in any organized effort to provide voters with transportation to the polls.
5. Regular, Reserve, or retired members on active duty (more than 180 days), except as otherwise authorized by law, may not hold elective or appointive civil office in the Federal or State Government (or any political subdivision). This rule in DoD Directive 1344.10 does not prohibit membership in fire, rescue squad, or similar organizations.

4307 REDRESS OF GRIEVANCES

A. Unions. Servicemembers are prohibited from joining, organizing, or recognizing military unions under 10 U.S.C. § 976, as implemented by SECNAVINST 1600.1 series. A military labor organization is any entity that attempts to engage in: bargaining on behalf of a servicemember concerning the terms of service; representing

servicemembers concerning military grievances; or any demonstration activity to recruit members. Servicemembers may participate in command authorized councils or any lawful council not constituting a military labor organization.

B. Request Mast. Article 1151 of U.S. Navy Regulations, 1990, provides that the commanding officer shall: "Afford an opportunity, with reasonable restrictions as to time and place, for the personnel under his command to make requests, reports, or statements to him, and shall ensure that they understand the procedures for making such requests, reports, or statements." Article 1151.1 adds: "The right of any person in the naval service to communicate with the commanding officer at a proper time and place is not to be denied or restricted." This right does not extend the right to a "personal audience" with officials above the member's commanding officer in the chain of command.

C. Complaint of Wrongs

1. Against the Commanding Officer. Article 138, UCMJ, provides a vehicle for redress of grievances for any member who feels wronged by his commanding officer. Article 138 complaints are discussed in detail in paragraph 4310 below.

2. Against Another Superior. Article 1150 of U.S. Navy Regulations, 1990, provides:

If any person in the naval service considers him- or herself wronged by an act, omission, decision, or order of a person who is superior in rank or command, that person shall not fail in maintaining a respectful bearing toward such superior, but may report the wrong to the proper authority for redress in the manner provided in this Article.

The GCMA shall inquire into the matter and take such action as may be warranted. To the extent possible, the GCMA will follow the guidance relating to review of Article 138 complaints in chapter III of the JAG Manual.

D. Inspector General. Article 0311 of U.S. Navy Regulations 1990, charges the Naval Inspector General with the inquiry "into and the report upon any matter which affects the discipline or military efficiency of the Department of the Navy." The Office of the Naval Inspector General, though, would become involved in the investigation of an individual grievance only collaterally, as part of a broader investigation, e.g., an investigation into safety conditions at a command. A position of Inspector General exists at Headquarters, U.S. Marine Corps, and of inspector at most major commands in the Marine Corps.

E. Right to Petition any Member of Congress

1. Congressional correspondence. Under 10 U.S.C. § 1034, "[n]o person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." This provision is repeated in Articles 1154 and 1155 of U.S. Navy Regulations, 1990.

2. Group petitions. Local regulations typically require servicemembers to obtain the base commander's approval before circulation on base of petitions addressed to members of Congress. The statutory bar in 10 U.S.C. § 1034 (1976) applies only to an individual servicemember's ability to submit a petition directly to Congress, and not to group petitions.

F. Equal Opportunity. The Department of the Navy fully supports equal opportunity. To ensure equal opportunity and to guarantee nondiscriminatory treatment within the Naval community, two separate and distinct grievance systems are in place.

1. Federal civilian employees are entitled to an initial investigation and review of complaints, followed by appeal to the Equal Employment Opportunity Commission (EEOC), and the option to file a civil action in U.S. district court. This process is governed by guidance promulgated by the EEOC and the Office of Personnel Management (OPM), which has been incorporated by reference as Navy policy (SECNAVINST 12720.5) These procedures do not apply to military members.

2. OPNAVINST 5354.1C implements the Navy Equal Opportunity Program for military members. The instruction sets out the rights and responsibilities for all active duty Navy and Naval Reserve units and personnel. Military members who perceive that they have been discriminated against or harassed should attempt to resolve the complaint at the lowest level possible and use fully the chain of command. To accomplish this goal, the military grievance procedure is divided into two categories, informal and formal.

3. The informal grievance procedure attempts to resolve the complaint with the person or persons involved. Assistance of the immediate supervisor involving the complaint may be requested. Normally, complaints are handled orally at this stage, but the servicemember may elect to pursue the matter in writing. If the immediate supervisor is the object of the complaint, the complaint should be presented to the next senior in the chain of command. If the discrimination complaint cannot be resolved at this level, the servicemember has the right to a request mast to discuss the matter with the commanding officer. If the matter cannot be resolved between the servicemember and the commanding officer, the commanding officer is required to advise the complainant of his or her right to submit a formal complaint and the method for submission.

4. The formal discrimination grievance procedure set out in OPNAVINST 5354.1C incorporates the Article 138/article 1150 U.S. Navy Regulations complaint procedure in full. If the discrimination complaint is not resolved under the informal grievance procedure, the complaint is handled purely as an Article 138 complaint, requiring compliance with the procedures set out in Chapter III of the JAG Manual.

5. If the servicemember is not satisfied that the complaint has been or will be properly resolved by the chain of command, the member may transmit the complaint via the Inspector General's "Fraud, Waste and Abuse Hotline. The Hotline may be used to report discriminatory practices, particularly sexual harassment.

G. Other Tools to Redress Grievances. Other mechanisms to redress greivances include Article 138, UCMJ complaints and petitions to the Board for the Correction of Naval Records or the Naval Discharge Review Board. These more complex topics are discussed below.

4308 THE BOARD FOR CORRECTION OF NAVAL RECORDS

A. References

1. 10 U.S.C. § 1552
2. MILPERSMAN 5040200
3. MARCORSEPMAN, fig. 1-2

B. Background. Before 1946, the only method of redress was the private bill in Congress, presenting a problem akin to early federal tort claims. The Board for the Correction of Naval Records (BCNR) was created by the Reorganization Act of 1946. Each service, including the Coast Guard, has its own. BCNR is composed of about 46 civilians; many have a military background, but that experience is not required. Three members constitute a quorum to hear cases to determine the existence of an error or an injustice and make appropriate recommendations to SECNAV. BCNR has a support staff of 41 employees, only 8 of whom are lawyers. Each Board has an Executive Director; Captain Dean Phifer, JAGC, USN, (Ret.) is the current Director for BCNR. BCNR is divided into sections, including a Disability Section; Discharge Section; Pay Section; and Performance Section.

C. Scope of review. Any member or former member or any other person considered by the board to be competent may make an application. Applications to BCNR are subject to several qualifications. In no event will an application be considered before other administrative remedies have been exhausted. When a "no change" decision has been rendered by the Naval Discharge Review Board (NDRB),

and a request for reconsideration by that board has been denied, a petition may then be filed with the BCNR. In addition to its power to consider applications concerning discharges adjudged by GCM's (something the NDRB may not do), BCNR may also review cases involving:

1. Requests for physical disability discharge and, in lieu thereof, retirement for disability;
2. requests to change the character of a discharge or eliminate the discharge and restore to duty;
3. removal of derogatory materials from official records (such as fitness reports, performance evaluations, nonjudicial punishments, failures of selection, and marks of desertion);
4. changing dates of rank, effective dates of promotion or acceptance/commission, and position on the active-duty list for officers;
5. correction of "facts" and "conclusions" in official records (such as lost time entries or line of duty/misconduct findings);
6. restoration of rank; and
7. pay and allowances items (such as special pays, incentive pay, readjustment pay, severance pay, and basic allowance for quarters).

D. Generic Processing. The first step is to get all records the applicant has. Get a current copy of the Official Military Personnel File, making sure you get ALL the fiche. Identify the issue and prepare the DD Form 149.

1. If the issue is pre-1972, put in the service number of the applicant in addition to the social security number. Any block having insufficient space, use "see attached sheets."

2. If the member agrees, check the block that you or they are willing to appear personally. Recognizing that this is an extremely rare event offered to less than 0.5% of the applicants, it shows BCNR the applicant is willing to go the extra mile to get the relief requested. BCNR allows members to appear when they want to eyeball the applicant, particularly in disability cases. BCNR will write you and invite you to appear.

You have 30 days to work out a docket date with the examiner, on which counsel and witnesses can appear. After that, BCNR will docket the case and proceed with or without you.

3. In Block 8a, tell BCNR what you want. If you don't ask for it, you won't get it. Make conditional requests as appropriate, e.g., pull my fitness report, expunge my failure of selection, put me in zone as if for the first time. BCNR can do most anything. If you have old references pertinent at the time, include a copy in your application. Don't assume BCNR has it all. They don't. Old regulations are available under a FOIA request to headquarters. Major commands often keep superseded directives for five years for reference purposes. List support, statements, and enclosures in Block 10.

4. The "Date of Discovery" is critical. The more timely the better. BCNR will always consider applications filed within three years of discovery of the error or injustice. If filed later, you have to justify the delay and explain the extraordinary reasons which prevented a timely filing. BCNR is authorized to excuse untimely filings in the interest of justice. The "I didn't know" excuse will rarely prevail; service regulations place the burden of ensuring that records are accurate squarely on the shoulders of the servicemember. The member may obtain review if they can credibly bring the discovery date within the three year period, e.g., "I didn't realize this was an error or injustice until my lawyer analyzed it."

5. Put applicant's home address on the bottom to avoid delay in the event of transfer. Send it off to: The Board for Correction of Naval Records, Department of the Navy, Washington, DC 20370. The application need not go via chain of command. For Marines contesting performance evaluations, applications are forwarded via HQMC (PE-5/PERB).

E. Strategies and Tactics

1. If challenging the substantive accuracy of a fitness report, you have to back up your claim with statements. You have to find people who can comment on the inaccuracy of the record by virtue of their official position, capacity to observe, judgment, etc.

2. If attacking the procedures, use the regulation. The government is bound to follow its own regulations. If the government fails to follow the regulation to the prejudice of the servicemember, you may be able to get some relief.

3. A common complaint is adverse information which is not referred to the servicemember for rebuttal. Whether material is "adverse" depends on Navy Regulations and service regulations on fitness report preparation. The concept of "adverse" is especially problematic in our inflated system of evaluations. Argue the circumstances. BCNR may remove the report or give you the opportunity NOW to write a rebuttal. This latter "relief" is not worth very much. You need to argue that the untimeliness of the rebuttal makes this relief unfair.

4. In failure of selection (FOS) cases, BCNR is not the only avenue of relief. Get something removed from BCNR and ask BCNR to expunge the FOS. If BCNR won't expunge the FOS, go to SECNAVINST 1401.1 series and ask for a special selection board. Argue that the information removed was considered by the first board improperly and unfairly influenced their decision not to select.

F. **BCNR Action.** BCNR sends a letter to notify you of your docket number. Call up and ask "Who is my examiner?" Examiners are nonlawyers who develop the case and present it to the panel. A lawyer may chop the case but it's unlikely that a lawyer will present it. Call the examiner to say you are ready, willing, and able to provide any additional assistance the examiner needs to prepare the case for presentation to the BCNR panel.

1. BCNR won't do anything until they retrieve the member's fiche. Having requested them yourself, you will know exactly what they are looking at. In determining whether or not material error or an injustice exists, the board will consider all evidence available, including: all information contained in the application; briefs submitted by, or on behalf of, the applicant; and all available military records.

2. BCNR may request advisory opinions from NMPC, CMC, OJAG, or wherever they think they will get the expert advice they need to resolve the request. BCNR will send you a copy of these advisory letters. Ensure you get them all, including all enclosures and references. In fitness report cases, BCNR may go back and ask the reporting senior for comment. This is more common in the Navy than in the Marine Corps. If the reporting senior chooses to comment, you will get a copy. BCNR will give you 30 days to respond to any outside input they receive. Do your best to rebut unfavorable advisory opinions. Don't give up your right to put in the last word.

3. All the opinions go back to the examiner who reviews the lot. When they understand and have a good handle on the case, they will docket it. The examiner will present the case to a panel of three members of the Board. The examiner may or may not offer a personal opinion on the merits of the application. The panel votes. If the vote is not unanimous, a minority opinion will be attached.

G. **BCNR Decision.** SECNAV has delegated to the Executive Director the authority to take final action in the following ten categories:

1. Leave adjustments;
2. retroactive advancements for enlisted personnel;
3. enlistment/reenlistments in higher grades;

4. entitlement to basic allowances for subsistence, family separation allowances, and travel allowances;
5. Survivor Benefit Plan/Retired Serviceman's Family Protection Plan election;
6. physical disability retirements/discharges;
7. service reenlistment/variable reenlistment and proficiency pay entitlements;
8. changes in home of record;
9. Reserve participation/retirement credits; and
10. changes in former members' reenlistment codes.

H. Follow-up. BCNR sends the applicant a letter advising of action.

1. If no relief is given, the applicant can later ask BCNR for reconsideration on the basis of new and significant additional information not previously considered and not previously available. The Executive Director will decide whether to permit reconsideration.

2. If relief is provided, the applicant should request his fiche again in six months to ensure the record has been corrected as directed by BCNR. If the record hasn't been corrected, send a copy of BCNR's final action to the offending agency responsible for maintaining the record; don't just go back to BCNR.

3. Expunged material goes into a confidential file at BCNR. The "hole" will be replaced by a filler letter: "Removed at the direction of the Secretary of the Navy . . . No adverse inference is permissible."

I. SECNAV Action. If favorable action is recommended (and not within the delegation of authority) BCNR will forward to the Office of the Assistant Secretary of the Navy for Manpower and Reserve Affairs (M&RA) who has been delegated the authority to act for the Secretary of the Navy in such matters. BCNR's report will be prepared by the examiner, typically in an exceptionally fair manner. The report will discuss the minority opinion in detail. If, and only if, the report of BCNR recommends favorable action (in whole or in part) the report will go to M&RA who will approve, disapprove, or modify. Sometimes M&RA will send it back to BCNR asking for reconsideration on portions of relief denied, thereby signalling that they may be disposed to favorable action. Then it goes back to BCNR with a cover memorandum. If no relief is recommended by BCNR, the report will NOT go on to M&RA.

4309 **NAVAL DISCHARGE REVIEW BOARD****A. References**

1. 10 U.S.C. § 1553
2. SECNAVINST 5420.174 series
3. MILPERSMAN 5040200
4. MARCORSEPMAN, fig. 1-2

B. General. The Naval Discharge Review Board (NDRB) is composed of five-member panels of active-duty Navy and Marine Corps officers in grades O-4 or higher. The NDRB panels sit regularly in Washington, D.C., and also travel periodically to other areas within the continental United States. The NDRB may begin its review process based on:

1. Its own motion;
2. the request of a surviving member; or
3. the request of a surviving spouse, next of kin, legal representative or guardian (if the former member is deceased or incompetent).

C. Scope of Review. The NDRB is authorized to change, correct, or otherwise modify a discharge. By statute, NDRB may NOT review punitive discharges awarded as a result of general court-martial; nor may it review a discharge executed more than 15 years before the application. In addition, the NDRB is not authorized to do any of the following:

1. Change any document other than the discharge document;
2. revoke a discharge;
3. reinstate a person in the naval service;
4. recall a former member to active duty;
5. change reenlistment codes;
6. cancel reenlistment contracts;
7. change the reason for discharge from, or to, physical disability;

8. determine eligibility for veterans' benefits; or
9. review a release from active duty before a final discharge has been issued.

D. Action. To change, correct, or otherwise modify a discharge certificate or issue a new certificate, NDRB must be convinced that the original certificate was "improperly or inequitably" given.

1. In making its determination, the board is usually confined to evidence in the former member's record during the particular period of naval service for which the discharge in question had been issued. NDRB may consider any information disclosed to, or discovered by, the naval service at the time of enlistment or other entry into the service. This evidence may include facts "found" by a factfinding body, e.g., a court-martial, court of inquiry, etc. Unless the former member can show coercion, the evidence should include charges and specifications to which guilty pleas were appropriately entered in court or which the former member admitted in a request for separation in lieu of trial by court-martial.

2. A discharge is deemed to be improper when an error of fact, law, procedure, or discretion at the time of issuance prejudiced the applicant's rights or when a change in policy of the applicant's branch of service is made expressly retroactive to the type of discharge he was awarded. Like the Board for Correction of Naval Records, NDRB is NOT empowered to change any discharge to one more favorable solely because the applicant has demonstrated exemplary conduct and character since the discharge, regardless of the length of time that has elapsed.

E. Secretarial Review. Action taken by the NDRB is administratively reviewable only by SECNAV. If newly discovered evidence is presented, NDRB may recommend to SECNAV reconsideration of a case formerly heard but may not reconsider a case without the prior SECNAV approval.

F. Mailing address. Applications and other information may be obtained from: Naval Discharge Review Board, Department of the Navy, 801 North Randolph Street, Arlington, Virginia 22203.

4310 ARTICLE 138 COMPLAINTS

A. Authority. Article 138, UCMJ, provides:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The

officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

B. Procedures. Implementing instructions are set forth in chapter III of the JAG Manual; the appendices include the general court-martial convening authority's (GCMA) letter to SECNAV and the GCMA notice to the complainant of the right to rebut. Two significant changes appear in the 1990 revision. First, Legal Assistance Attorneys may not assist servicemembers in the preparation of Article 138 complaints. Second, Marines may not use an Article 138 as a means to attack adverse fitness reports, given the existing avenues for relief in MCO 1610.7. Proceedings on the complaint held by the GCMA will depend on the seriousness of the allegations; the whereabouts of the complainant, the respondent, and witnesses; the available time; and the exigencies of the service. The following checklist may be helpful as a tool for GCMA review of Article 138 complaints.

CHECKLIST FOR OEGCMJ REVIEW
OF ARTICLE 138 COMPLAINTS

- ___ Original complaint or certified copy received
- ___ Complaint is complete (See Appendix A-3-a(1), JAG Manual)
 - ___ Includes all documents submitted by complainant and intermediate endorsers
 - ___ Signed and sworn by complainant
 - ___ Cites Article 138, UCMJ
 - ___ Addressed through respondent and appropriate chain of command
 - ___ Clearly identifies respondent (and only one respondent) by name and title
 - ___ Reflects complainant has made a prior request for redress from respondent which was denied (request and respondent's response should be enclosures to complaint)
 - ___ Respondent has Article 15, UCMJ, power over complainant
 - ___ Facts and circumstances giving rise to alleged wrong(s) are detailed and available supporting information included
 - ___ Personal detriment or harm suffered from alleged wrong(s) detailed
 - ___ Specific relief requested
 - ___ Requested relief may be granted in command channels
- ___ Complaint lies within scope of Article 138, UCMJ
- ___ Complaint is timely, 90 days unless unusual circumstances
- ___ If complaint is not cognizable under Article 138, UCMJ, OEGCMJ shall return it to complainant advising him of alternative avenues of redress, e.g., article 1150, U.S. Navy Regulations, 1990, complaint or petition to the Board for Correction of Naval Records. Acts which are not cognizable under Art. 138 include:
 - ___ Acts not initiated or ratified by the respondent

- ☐ Acts which are not final
- ☐ General policy matters
- ☐ Requests for disciplinary action on another
- ☐ GCMA action on Article 138 complaint (except failure to forward)
- ☐ Other DoN procedures exist for redress of the specific type of complaint
- ☐ If the complaint is cognizable under article 138, but otherwise defective, OEGCMJ will:
 - ☐ Return complaint and advise complainant of nature of defect
 - ☐ Give complainant 30 days to cure defect
 - ☐ Advise complainant that complaint will be acted on despite defect, only if complainant so desires and resubmits his complaint within 30 days.
- ☐ If redress is denied for failure to cure improper joinder (complaints may not be joined with complaints of other individuals) or lack of timeliness, OEGCMJ must report to SECNAV
- ☐ If cognizable complaint, OEGCMJ will conduct inquiry into complaint
- ☐ Ensure complainant receives copies of all endorsements, enclosures, and adverse matters added to his complaint (including results of any inquiries ordered by OEGCMJ) and that record reflects that complainant received such materials
- ☐ If relief is granted, include documentation of relief granted or that action to effect relief has been directed
- ☐ Advise complainant in writing of OEGCMJ's action on complaint including specific findings as to which complaints were determined to have merit and which were found to be without merit
- ☐ OEGCMJ personally signed report to SECNAV setting forth action on complaint
- ☐ Include in the report to SECNAV the entire file, including original/certified copy of complaint, all information considered by OEGCMJ, and the action of OEGCMJ

____ Marine Corps activities forward the report via CMC

CHAPTER 44

CIVILIAN PERSONNEL LAW

4401 **INTRODUCTION.** In general terms, the management of the federal civilian workforce is based on merit. The heart of the system is the Civil Service Reform Act of 1978 (CSRA). Congress attempted to resolve the deficiencies in the Pendleton Act of 1883, a system which had "become a bureaucratic maze which neglects merit, tolerates poor performance, permits abuse of legitimate employee rights, and mires every personnel action in red tape, delay, and confusion." The Act provides a clear statement of merit systems principles. 5 U.S.C. § 2301. The Act also delineates prohibited personnel practices. 5 U.S.C. § 2302. Violations of these prohibited personnel practices can nullify the management action and possibly lead to discipline of the management official involved. In addition to these general principles, Congress and an administrative agency, the Office of Personnel Management (OPM) regulate many of the terms and conditions of employment in the Federal sector. The workforce remains highly structured, and in the opinion of many, the "bureaucratic maze" still exists. To protect federal workers and ensure compliance with merit principles, Congress also provided a comprehensive dispute resolution scheme. This scheme allows almost every worker the ability to challenge almost any decision by management affecting him or her before & third party. This chapter provides a brief overview of this complex and important area. SJAs can expect calls for advice across the entire spectrum of personnel law. Hopefully, this chapter will help the SJA identify the issues and provide a starting point for research.

4402 **STATUTORY AND REGULATORY FRAMEWORK**

A. **Constitutional.** The President has the power to nominate and appoint, with advice and consent of Congress, "Officers of the United States." Below the level of Presidential appointments, however, Congress has the power to appoint "inferior officers" which power may be vested in the President, the courts, or the heads of departments. Article II, § 2.

B. **Statutory.** Congress granted the President the power to admit employees into civil service in the executive branch, to ascertain the fitness of applicants, and to prescribe the duties of individuals to administer the civil service. 5 U.S.C. § 3301. Civil service is defined as all appointed positions in all branches of the government except the armed forces. 5 U.S.C. § 2101. Congress also gave the President the power to prescribe rules governing the competitive service, including the power to make necessary exceptions of positions from competitive service. 5

U.S.C. § 3302. The competitive service includes, among other things, all civil service positions in the executive branch, unless excepted. 5 U.S.C. § 2102.

1. Congress gave the Office of Personnel Management (OPM), formerly the Civil Service Commission, broad legislative rule-making authority. The President may delegate his authority to OPM, and OPM may delegate to agency heads. 5 U.S.C. §§ 1101-1105, 1301-1305.

2. Despite these seemingly broad delegations, Congress has retained some micro-management by specifically legislating many terms of employment. These terms apply only to "employees" which unless differently defined in the applicable provision, include civil service appointees paid from appropriated funds. Persons paid from non-appropriated funds are not normally considered "employees" covered by the laws administered by OPM. 5 U.S.C. § 2105.

C. **Regulatory.** The President implements his authority primarily by Executive Order 10577. OPM has implemented its authority through regulations published at 5 C.F.R. Parts 1-1001 and through issuance of the Federal Personnel Manual (FPM). The FPM consists of the basic manual, supplements, letters and bulletins. The FPM is maintained at most activities by the servicing Civilian Personnel Office. These regulations are further implemented by DoD's Civilian Personnel Manual and DoN Civilian Personnel Instructions (CPIs). The numbering systems of the CPIs, C.F.R. sections and FPM chapters loosely parallel the statutory numbering system. For example, if faced with an issue involving an adverse action for misconduct, you might consult 5 U.S.C. Chapter 75, 5 C.F.R. Part 752, and FPM Chapters 751 and 752.

4403 **WORK FORCE STRUCTURE.** Civil service positions are divided into the competitive service, excepted service and senior executive service (SES). SES employees are subject to special rules beyond the scope of this Deskbook. Rights and entitlements vary between the other two categories. To further complicate the categories, Congress has chosen to give veterans and certain other individuals preferential treatment in securing and retaining employment and to give employees with different tenure different treatment. Many personnel decisions including appeal rights, placement rights, rights during force reductions, vary accordingly.

A. **Appointment.** Consistent with merit principles, positions are normally filled through a competitive process. The primary determinate in filling positions is the qualifications of the applicants to perform the duties of the position. Consideration of non-merit factors is generally prohibited, although Congress and the President have sanctioned consideration of certain non-merit factors, e.g., veteran's preference under 5 U.S.C. § 2108.

1. When a position becomes vacant, the supervisor asks the civilian personnel office (CPO) to take action to fill the vacancy. CPO announces the vacancy

and provides for an application period. Applicants (which can include employees who are filling other positions) provide a statement of work history. The CPO staffing section uses this history to evaluate whether the applicant is qualified for the position. CPO ranks the qualified applicants based upon the knowledge, skills, abilities, and other factors necessary to perform the duties. A selecting official reviews the qualified applicants (usually the top 5) and makes a selection.

2. Once selected, the applicant must be properly appointed. The power to appoint has been delegated to the commander of each organization to which a Central CPO is assigned. 5 U.S.C. § 3304; 5 C.F.R. § 337.101; 5 C.F.R. Part 332. Normally, the documents appointing an individual are signed by the civilian personnel office "FOR THE COMMANDER." OPM regulations describe the status of the employee once appointed, and such status is reflected on standard forms maintained in the Official Personnel Folder (OPF).

3. At the installation level, most employees will be either in the competitive or excepted service. Excepted service appointees must compete with other applicants. The positions filled in the excepted service, however, are excepted from the competitive service because it is considered impractical to apply the qualification standards and requirements which were established for the competitive service. Civilian attorneys are normally in the excepted service.

B. Position Descriptions (PDs). The duties and responsibilities of a particular position are set forth in a PD. The PD is used to evaluate applicants in the placement process. The PD is also used to determine where the position fits into the respective pay scheme.

C. Pay and Position Management. There are two basic pay systems for the positions to which individuals are appointed, General Schedule (GS) and Federal Wage Survey (FWS).

1. General Schedule. Congressional intent is equal pay for equal work, nationwide, for these employees. To ensure this, Congress passed the Classification Act of 1949 which categorizes GS positions by grade (1-18) based upon "differences, difficulty, responsibility, and qualification requirements." 5 U.S.C. Chapter 51.

a. OPM published the standards used by the local classification section to classify positions at OPM handbook page X-118. Disputes concerning proper classifications are resolved by OPM. The amount of pay and increases in it are governed by statute. Employees are entitled to periodic step increases in pay even though the grade or position remains the same. This pay increase is determined by length of time and is automatically granted as long as the employee performs at an "acceptable level of competence." 5 U.S.C. § 5335. This increase is called "WIGI," within grade increase.

b. The Civil Service Reform Act provides for "merit pay." Merit pay applies only to grades 13 through 15 which are also supervisory or management officials. These positions have been redesignated as GM-13, GM-14, and GM-15. 5 C.F.R. Part 340. These employees compete for merit pay. Their entitlement, if any, to merit pay is determined by the size of a merit pay "pool" and their performance appraisal. Employees covered by the merit pay program may also be entitled to case awards for superior accomplishments. These employees are not entitled to the automatic increases within grade. In addition to the merit pay program, GM employees may receive cash awards. 5 U.S.C. § 5403.

2. Federal Wage Survey (FWS). FWS employees are normally of trades and crafts vocations and their jobs are designated WG (Wage Grade) or WS (Wage Grade Supervisor). Congressional policy is to allow these pay rates to be adjusted from time to time so they remain substantially equal to wages in the local area for the same work. FWS employees are also entitled to increases within their grade. 5 U.S.C. §§ 5341-5342; 5 C.F.R. Part 532.

D. **Promotion.** Since Congressional policy is to favor equal pay for equal work through classification an employee must normally progress to higher graded positions to obtain higher salary (other than longevity increases). To a large extent, promotion programs and procedures are left to the discretion of the agency as long as the overall scheme is designed to ensure a systematic means of selection for promotion according to merit. Other than having some basic minimums, agencies have much discretion, which also means that this area is ripe for negotiations with labor organizations leading to procedures which are contractual. 5 C.F.R. Part 335; FPM Chapter 335; 5 U.S.C. § 7117.

4404 **DISCIPLINE.** Both Congress and the President have taken active roles in proscribing certain conduct by federal employees. The primary Congressional activity involves restrictions on partisan political activity and delineation of ethical standards in government. 5 U.S.C. §§ 7321-7327. The President prescribed ethical standards in Executive Order 11222. In addition, the Navy has issued its own regulations on misconduct with a table of recommended penalties. CPI 752. Regardless of these specific prohibitions, employees may be disciplined for any conduct which adversely impacts the "efficiency of the service." 5 U.S.C. Chapter 75. Disciplinary action can include oral admonishment, written admonishment, reprimand, suspension, downgrade (demotion), or removal. The status of the employee and severity of the action are the primary determinates of the employee's appeal rights.

4405 **PERFORMANCE APPRAISAL SYSTEM.** The performance appraisal is used to establish work requirements and standards for the position. This portion of the form is used as a basis for removing employees for unacceptable performance and for making other less significant management decisions. The performance plan and rating portion is required by statute and this portion of the

appraisal system has been approved by OPM, also a CSRA requirement. The purpose of the performance plan is to provide an "accurate evaluation of job performance on the basis of job criteria." Using a Position Description (PD) as a backdrop, a supervisor identifies elements (job components) for the employee and develops standards (expectations or requirements) by which to measure the employee's performance of the tasks. An element is a critical element if the supervisor considers the job component to be so important that failure to meet requirements of that component means that the employee is not satisfactorily performing in the position. The standards used to measure the performance of an element are to be, to the extent feasible, objective, and may consider such factors as quality, quantity, timeliness, and manner of performance. 5 U.S.C. Chapter 43.

4406 UNACCEPTABLE PERFORMANCE. One of the primary purposes of the CSRA was to make it easier to remove employees who did not produce. Using procedures different from those used for misconduct, an agency may demote or remove an employee for "unacceptable performance." Unacceptable performance is a term of art; proof is tied to the civilian employee appraisal system. Unacceptable performance is defined as performance which fails to meet established performance standards in one or more critical elements of such employee's position. Although the procedures for removal for unacceptable performance are intended to simplify matters, the statute requires certain steps before removal can even be proposed.

4407 OTHER ADVERSE ACTIONS. Occasionally, management must take actions adverse to the employee for reasons unrelated to misconduct or unacceptable performance.

A. Reduction in Force (RIF). Mission changes, funding cuts, and a multitude of other reasons may compel an agency to cut back on positions for reasons independent of poor performance or misconduct. Given this possibility, OPM has established priorities among employees for retention to determine which employees are entitled to remain. In general terms, employees are ranked considering: tenure of employment, veteran's preference, total length of civilian and credible military service, and performance ratings. 5 U.S.C. § 3502; 5 C.F.R. Part 351. These rankings are used to place the employees in the positions which still remain after the cutback. Thus, as a result of a RIF, a faultless employee may be assigned to a position with a lower grade and less pay. To soften this blow, Congress passed provisions which allow for pay and grade retention. The RIF process cannot be used in lieu of adverse action procedures.

B. Medical Incapacity. An adverse action taken because an employee fails medical standards for retention in the employee's position is considered non-disciplinary. Management has the authority and responsibility to make sure that employees meet medical standards and employees are obligated to cooperate.

Therefore, an employee can be disciplined, including removal, for refusal to take a mandatory medical examination. 5 C.F.R. Part 339.

C. Functional Transfer. While failure to accompany a position in a functional transfer is both personal to the employee and within his control, adverse actions in such cases are considered non-disciplinary.

4408 **EEO REFERENCES.** Procedures relating to hearings by Equal Employment Opportunity Commission Administrative Judges may be found in the regulations at 29 C.F.R. Section 1613.201. For general information regarding the relevant burdens of proof for the parties to the hearing, see, McDonnell Douglas Corp. v. 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981); Day v. Matthews, 530 F.2d 1083 (D.C. Cir. 1976); and Griggs v. Duke Power Co., 401 U.S. 424 (1971). To judge the probability of prevailing in these matters and, collaterally, the desirability of entering into a settlement agreement, SJAs must be familiar with the legal burdens the parties must meet.

4409 **INTRODUCTION TO EEO HEARINGS PROCEDURES.** Although the Complainant has a right to a hearing, settlement of the complaint is often a desirable alternative. Consequently, both parties are expected to be prepared to discuss the possibility of settling this complaint during the prehearing conference. For these reasons an Agency representative with authority to negotiate and sign a binding agreement must be available during the prehearing conference.

4410 **SETTLEMENT POLICY.** Voluntary settlements of complaints are both authorized and encouraged by the Commission's regulations (29 C.F.R. § 1613.217) and may provide for all appropriate remedies, without finding fault on the part of either party. Settlement agreements do not constitute admissions of wrongdoing by the Agency or by an Agency employee. Both parties must approach settlement discussions from a position of flexibility, at least with respect to the range of relief that each party is willing to discuss. To focus the range of relief, the Administrative Judge is available to advise both parties as to what types of relief are common to the type of complaint at hand. The complainant should understand that, if this matter goes to hearing, the Administrative Judge will render a recommended decision based on evaluation of the evidence presented, both at the hearing and in the total complaint file. Since the possibility exists they may not prevail, employees should give serious consideration to Agency settlement offers before deciding to proceed to hearing.

4411 **PRIOR TO THE HEARING.**

A. Intent to Participate. Within 7 days of receipt of the scheduling notice, the complainant and the agency must notify the Administrative Judge of their intention to participate in the hearing and the names, addresses, and telephone

numbers of their representatives. The Complainant's failure to indicate an intention to participate in the hearing within the allotted time may result in the complaint being remanded to the Agency for failure to proceed.

B. Requested Witnesses. Within 10 days of receipt of this scheduling notice submit a list of proposed witnesses to the Administrative Judge, which specifies the names, titles and addresses of the witnesses, along with a brief explanation of each witness' expected testimony. Witnesses will only be approved if their expected testimony is relevant, material and not unduly repetitious with respect to the issues in the complaint. Failure to provide the information requested within this time period may result in the disapproval of the requested witness or the remand of the complaint for failure to proceed.

C. Approved Witnesses. If a witness is approved who is currently employed by the Agency, the Agency must provide for that witness's appearance at the hearing, including any associated costs. If an approved witness is currently employed by another federal agency, the Agency representative is required to assist the Administrative Judge in obtaining the appearance of that witness. If any approved witness is not currently employed in the federal service, the party requesting the witness must make all arrangements for the appearance of that witness, including any associated costs.

D. Delay. Requests for postponement must be in writing and include an explanation of what circumstance beyond the control of the party necessitates the postponement.

E. Ex Parte Communications. Copies of correspondence and documents submitted to this office must be sent to the other party.

4412 AGENCY RESPONSIBILITIES

A. Logistics. The Agency must arrange for the use of a room in which to conduct the hearing. The room must be large enough to accommodate approximately eight people, must be properly ventilated, and must have an electrical outlet. The Agency must notify the Administrative Judge, the Complainant, and the Complainant's representative of the location of the hearing room within 7 days of receipt of this scheduling notice.

B. Transcription. The Agency must arrange for a court reporter to transcribe testimony taken at the hearing. Under EEOC Management Directive 107 the court reporter must not be an employee of the Agency and must be instructed to

deliver the original and all copies of the transcript to the Administrative Judge within 21 days of the close of the hearing.

4413 RIGHTS AND OBLIGATIONS OF THE PARTIES

A. Generally speaking, only the complainant, the complainant's representative, the Agency representative, the Administrative Judge, the witness being examined, and the court reporter will be permitted in the hearing room at any one time.

B. Both parties will be afforded an opportunity to present brief opening and closing statements, as well as documentary and testimonial evidence. The testimony of witnesses will be taken under oath or affirmation. Both parties may examine and cross-examine witnesses.

C. Evidence may be excluded which is irrelevant, immaterial or repetitious. Documentary evidence in the investigative file is already part of the record to be considered by the Administrative Judge and need not be reintroduced.

4414 THE NAVY DRUG FREE WORKPLACE PROGRAM.

The Drug-Free Workplace Program is mandated by Executive Order 12564 and Public Law 100-71. The President's National Drug Control Strategy required full implementation of Federal Agency Drug Free Workplace Programs by 5 January 1990. The Department of the Navy Drug-Free Workplace Program (DON DFWP) policy and procedures are set forth in SECNAVINST 12792.3 and CPI 792. See also OPNAVINST 12792.3.

A. Goal. The goal of the DON DFWP is to provide a "workplace free from the effects of illegal drug use." The program is designed to prevent or discover illegal drug use by our civilian employees. The program provides for both voluntary and mandatory urinalysis of those employees and has a voluntary self-referral. Some resistance to the DON DFWP is anticipated from federal employee unions. SJAs should familiarize themselves with the references to assist field commands in the implementation of this program.

B. Additional Reading. For a detailed analysis of the legal issues surrounding compulsory urinalysis of civilian employees, see Hollerich, The Fourth Amendment and the Navy Drug-Free Workplace Program, 39 Naval L. Rev. 143 (1990).

4415 **WORKERS COMPENSATION.** In the Federal Government, workers' compensation refers to the Federal Employees Compensation Act (FECA)(5 U.S.C. §§ 8103-8193) which provides benefits to civilian employees of the United States (except for non-appropriated fund employees) who are injured in the

performance of their duties. This includes pre-existing conditions which are aggravated by the employment as well as recurring conditions.

A. Coverage. In addition to personal injuries and occupational disease, the FECA covers damage to medical braces and artificial limbs or other prosthetic devices incidental to personal injury. Except for prosthetic devices or appliances, the FECA contains no provision for reimbursement for loss of personal property. See the Personnel Claims Act in this Deskbook. The FECA also provides a type of survivor benefits to dependents of employees who die as the result of job related disease or traumatic injury.

1. A "traumatic injury" is a wound or other condition of the body caused by external force, including stress or strain. The injury must be identifiable as to time and place of occurrence as well as the part or function of the body affected. It must be caused by a specific event or incident or series of events or incidents within a single work day or shift.

2. An "occupational disease" is a non-traumatic injury or condition produced in the work environment over a period longer than one work day or shift. It may result from systemic infection, repeated stress or strain, exposure to toxins, poisons, fumes or other continuing condition of the work environment.

B. Exclusive Remedy. The FECA is a covered employee's sole remedy against the Federal Government for work-related injuries. The Federal Tort Claims Act specifically excludes claims cognizable under FECA. Non-appropriated fund employees are not covered by the FECA but receive similar coverage under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §§ 901-950). The FECA is administered by the Office of Workers' Compensation (OWCP) of the U.S. Department of Labor.

C. Procedure. To qualify for the benefits under the FECA, a covered employee who is injured at work should report the injury immediately to her supervisor and obtain first aid if necessary. If further medical treatment is required, the employee must obtain a Form CA-16, from the supervisor authorizing treatment by a physician or hospital of the employee's choice.

1. Then, within 30 days of the date of injury or discovery of the illness, the employee (or representative) should submit a written report on either Form CA-1, "Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay/Compensation" or Form CA-2, "Federal Employee's Notice of Occupational Disease and Claim for Compensation." OWCP will normally pay for emergency treatment for which prior authorization has not been requested, but may refuse to pay for unauthorized routine treatment.

2. Although employees may be treated by the health care provider or hospital of their choice, they must obtain written permission to change providers

and OWCP may require the employee to submit to an examination by a specific physician to qualify for or continue receiving benefits.

D. FECA Benefits. FECA benefits include Continuation of Pay, Compensation, and Dependents' benefits.

1. Continuation of Pay (COP). COP is continuation of an employee's regular salary for up to 45 calendar days of lost wages due to traumatic injury. COP is designed to prevent interruption of an employee's income while the claim is being processed. The employee cannot be required to use annual or sick leave during this 45 day period. COP is not considered FECA compensation, discussed below, and is subject to income tax and other deductions. COP can be terminated if the employee fails to provide her agency with medical evidence of her injury within 10 days of claiming COP, or the employee's scheduled period of employment expires.

2. Compensation. In cases of traumatic injury where the disability continues beyond 45 days or cases of disease or cases of non-traumatic injury, the employee may apply for compensation. Compensation may be paid following a three-day waiting period after wage loss begins when the medical evidence shows that the employee is unable to perform the duties of her regular job. Compensation is provided at two-thirds of the employee's regular pay rate (including shift, hazard, premium, holiday and Sunday pay, but excluding overtime) if the employee has no dependents; three-fourths of that rate if the employee is married or has one or more dependents. There is no limit on the total amount of compensation which may be paid to an individual employee but the maximum payment per month cannot exceed three-fourths of the highest rate of basic pay for a GS-15. The FECA also provides a schedule of payments for the total or partial loss, or loss of use, of certain members, functions and organs of the body, as well as for disfigurement of the face, neck, or head.

3. Dependents' Benefits. If an employee dies as the result of a work-related disease or injury, the surviving spouse and/or children may be entitled to dependents' compensation benefits of varying amounts depending on the number and type of survivors. In addition, a burial allowance may be paid. Currently, FECA compensation benefits are not subject to Federal income tax.

E. OWCP Powers. OWCP may require employees receiving compensation to undergo a medical examination, participate in a rehabilitation program or even return to work either at light duty or at lower rate of pay with compensation for the loss of earnings. Failure to comply with such OWCP directions or to provide requested information to OWCP, may result in the suspension or termination of benefits.

F. Appeal Rights. Employees who disagree with a final OWCP decision may submit a written request for an oral hearing or a review of the written record by the OWCP Branch of Records and Review. After that, the employee may request in writing that OWCP reconsider its decision. Once all available evidence has been submitted, the employee has the right to appeal to the Employees Compensation Appeals Board (ECAB) for review of the OWCP decision. This appeal process is the employee's exclusive remedy and ECAB decisions are not subject to judicial review. As noted above, the FTCA specifically excludes workers' compensation cases from its waiver of sovereign immunity.

G. SJA Role. SJAs should be concerned about the FECA process because first, as with any other claim against the government, the naval command involved needs accurate legal advice to protect the government's interests. Perhaps more importantly from a local commander's point of view, a recent DoD-wide change in FECA accounting practices has caused a direct financial impact at the command level.

1. Until 1989, workers' compensation costs were paid out of a central fund and were not charged against local operating funds. Unfortunately, the system provided no financial incentive for commands to reduce FECA costs. As a result, cases were not very closely monitored at some commands and created a situation where some recovered or recovering employees could simply stay at home, unchallenged while drawing tax-free compensation payments equivalent to up to three-fourths of their regular pay.

2. Not surprisingly, FECA costs rose significantly during the 1980s. In response to this problem, DoD decided to reemphasize command responsibility for reducing FECA costs by requiring that those costs be charged against the operating funds of the command employing the injured worker. Although all commands received some additional funding based on past costs, the charge-back program has still had a significant financial impact on local commands.

3. In response, local commanders, working through their servicing civilian personnel offices, have taken steps to reduce their FECA costs. These steps include: workplace safety programs designed to prevent compensable injuries; close scrutiny of all claims; challenges to suspect claims; and identification of light duty or other positions which could be filled with partially disabled or recovering employees coupled with an aggressive effort to return such employees to work.

4. SJAs can assist commanders in their effort by familiarizing themselves with various directives concerning the FECA, working with the CPO to ensure that any return to work programs comply with those directives while protecting the Navy's interests to the greatest possible extent. Further information on the FECA program is available in the FPM, Chapter 810; Navy CPI 810 and the

Commanding Officer's Guide to the Federal Employees' Compensation Act ((NAVSO P-3674).

4416 GLOSSARY OF CIVILIAN PERSONNEL TERMS

A. Administrative Judge. The hearing officer at MSPB or EEOC hearings. MSPB hearing officers used to be called "Presiding Official" and EEOC hearing officers used to be "Complaint Examiners."

B. Administrative Law Judge. An ALJ is the hearing officer in a ULP (and very rarely in an MSPB hearing). They have special protections against having adverse actions taken against them.

C. Agency Grievance Procedure. A dispute resolution process which is internal to the Department of the Navy. In general terms, this procedure can be used for those disputes which are not within the jurisdiction of some other third party dispute resolution process (e.g., EEOC, NSPB, RLFA, or The Negotiated Grievance Procedure).

D. Arbitrator. This is the hearing officer for the final step of the Negotiated Grievance Procedure, arbitration. He or she is the neutral third party, selected by the parties to the collective bargaining agreement.

E. Discrimination Complaints Investigations Component (DCIC). This is component within the Department of the Navy which is tasked with investigating an accepted complaint of discrimination and providing basic analysis. They provide recommended decisions which an activity commander may adopt or reject in issuing a proposed decision.

F. Employee Appeals Review Board (EARB). This entity prepares the "final agency decision." EGO complainants who are not satisfied with proposed dispositions from the activity may either request a hearing before an EEOC AJ who sends the EARB a recommended decision with a transcript of the hearing or they may appeal the proposed decision directly to the EARB based on the administrative record provided by DCIC.

G. Equal Employment Opportunity Commission (EEOC). The EEOC enforces the discrimination laws: the Civil Rights Act (42 U.S.C. § 2000e); the Age Discrimination in Employment Act (29 U.S.C. § 633a); and, the Rehabilitation Act (29 U.S.C. § 791, et seq.)

H. Federal Labor Relations Authority (FLRA). This is the federal sector equivalent to the National Labor Relations Board. Their jurisdiction includes, among other things, whether a provisions is bargainable and adjudications of ULP charges.

I. Mixed Case. This is a term of art defined in 5 U.S.C. § 7702. This animal has two primary issues: an adverse action appealable to the MSPB and an allegation of discrimination related to the adverse action.

J. Merit Systems Protection Board (MSPB). The Board adjudicates employee claims that certain personnel actions were not proper. Only certain categories of employees may appeal certain types of adverse actions to the Board.

K. Negotiated Grievance Procedure. This is a dispute resolution process which must be included in any collective bargaining agreement between an activity and a union. Only employees in the bargaining unit represented by the union, the union, and management can use this process. The scope of subject matter jurisdiction is limited by statute (5 U.S.C. Chapter 71) and may be further limited by the agreement itself.

L. Office of Review and Appeals (ORA). This is the office within the EEOC to which complainants may appeal final agency decisions.

M. Responsible Management Official (RMO). This is the person alleged to be responsible for the alleged discriminatory agency act or practice in an EEO complaint. The term used to be Alleged Discriminating Official (ADO).

N. Unfair Labor Practice (ULP). This is conduct by management or the union which violates 5 U.S.C. § 7116.

CHAPTER 45

MISCELLANEOUS ISSUES

INSURANCE STATEMENTS AND HOLD-HARMLESS AGREEMENTS

4501 **HOLD-HARMLESS AGREEMENTS.** A g r e e m e n t s purporting to hold a party harmless from liability resulting from negligence causing damage to persons or property are closely scrutinized by the courts. Hold-harmless agreements are frequently held to be of no legal validity, especially as used by the U.S. Government. With the waiver of sovereign immunity with the enactment of the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680 in 1946, the United States accepted liability for its negligent or wrongful acts just as though it were a private person. Congress expressed the public policy that the Government should respond in damages, as a matter of course, for the negligent or wrongful acts of its officers or employees. Nothing in the legislative history suggests that Congress contemplated that its remedy should be frustrated by government agencies through the device of demanding exculpation from the members of the public with whom they deal.

4502 **JUDICIAL REVIEW.** The actions and attitude of the federal courts in considering the validity of contractual waivers of benefits conferred by the Congress under other statutes indicate that the public-policy implications of the FTCA will not be overlooked should the Government attempt to rely upon an exculpatory agreement in its defense of a suit. In general, a right or benefit provided by statute can be waived by a binding contract if no question of public policy is involved. Conversely, however, where the benefit conferred by statute involves a question of public policy, any attempted contractual waiver of that benefit is void.

4503 **STANDARD.** The test for deciding whether the effect of any specific statute can be avoided by agreements seems to be whether the statute is one enacted for the protection of the public generally or of the rights of individuals. A right conferred as a matter of public policy cannot be limited or waived, while the person for whose individual benefit a right is given by a statute may contract away that statutory right. Arguably, the rights given under the FTCA are for the individual benefit of persons injured through the negligent or wrongful acts of officers or employees of the Government. There seems, however, to be a strong case that FTCA rights are conferred as a matter of public policy, and therefore cannot be waived.

4504 **DETERRENCE.** The general legal validity of agreements purporting to relieve the United States Government from liability in tort is doubtful at best. In most instances, agreements to exculpate the Government will be effective, if at all, only as a possible deterrent to the filing of claims or suits authorized by law. Such a deterrent would be effective only against those persons who, having agreed to exculpation, would feel morally bound not to take advantage of the legal invalidity of the agreement.

4505 **INSURANCE STATEMENTS.** Hold-harmless agreements must be distinguished from agreements where the private organization, e.g., a motion picture company filming on an installation, would promise to reimburse the Navy for any damage to Government property which was damaged, either wilfully or negligently, by its employees. These agreements are desirable whenever a U.S. agency or department lends or makes available its property to any non-governmental entity, including a commercial enterprise.

4506 **SAMPLE DOCUMENTS.** The sample documents on the following pages may be helpful in preparing tailored agreements for specific circumstances.

SAMPLE INSURANCE STATEMENT

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, _____, a corporation organized and existing under the laws of the State of _____, in consideration of permission granted for the use of Department of the Navy property, facilities, equipment, vessels, and aircraft, including but not limited to (briefly list such Navy or Marine Corps property, etc., as will be used)

_____, in the production of the motion picture now entitled _____, during the period _____ to _____, does hereby expressly agree to maintain, at its sole expense, liability insurance sufficient to cover any and all damage to Department of the Navy property, facilities, equipment, vessels, and aircraft as may result during its use of said Department of the Navy property, facilities, equipment, vessels, and aircraft from the fault or negligence of the undersigned, its agents, employees, or subcontractors.

Authorized representative
Date

Witnessed this
day of _____, 19____

(Department of the Navy representative)

RELEASE OF LIABILITY AND ASSUMPTION OF RISK

I. The United States of America, hereinafter called the GOVERNMENT, hereby grants permission to _____ hereinafter called the PARTY, to enter upon the military reservation known as Marine Corps Base, Camp Pendleton, California, for the following period: from the _____ day of _____, 19 _____ to the _____ day of _____, 19 _____ inclusive, for the purpose(s) of _____

2. The PARTY acknowledges:

a. That the PARTY is fully aware that the Marine Corps Base, Camp Pendleton, is a United States Military Reservation; and

b. That the presence of the PARTY at and upon any and all areas comprising the said reservation and the participation of the PARTY in the activities set forth in paragraph 1 above subjects the PARTY to extraordinary risks of personal injury, disablement, and death by virtue of, but not limited to, the nature of the activities in which the PARTY is participating, the military exercises planned or in the process of execution aboard the reservation, and the quantities of explosive ordnance located at both posted and unposted areas aboard the reservation.

3. In consideration for permission to enter Marine Corps Base, Camp Pendleton, for the purposes set forth in paragraph 1 above, the PARTY agrees for the PARTY and for the heirs, assigns, executors and administrators of the PARTY:

a. To voluntarily, willingly, and knowingly assume the risks in being present aboard the said military reservation including, but not limited to, those risks set forth in paragraph 2 above; and

b. To release the GOVERNMENT, including all its subdivisions, offices, military personnel, employees and agents, from all liability for any damages, injuries or death that may result to the PARTY while the PARTY is within the military reservation known as Marine Corps Base, Camp Pendleton, including but not limited to the PARTY's participation in the activities set forth in paragraph 1 above, whether caused by negligence or otherwise.

4. IT BEING UNDERSTOOD that the PARTY's agreement to release the GOVERNMENT from all liability for any damages, injuries or death extends to any damages, injuries or death caused by the negligent or wrongful act or omission of any employee of the GOVERNMENT while acting within the scope of his office or employment.

Signed and AGREED to this _____ day of _____, 19 _____

Signature of PARTY

REPRESENTATIVE OF GOVERNMENT

SAMPLE MOTORCYCLE SAFETY COURSE WAIVER FORM

This form must be completed, signed and given to your instructor prior to beginning your on-cycle Instruction.

Participants must be a legal resident of the State of _____.
Participants under the age of _____ years must have the signed approval of a parent or legal guardian to enroll in this motorcycle safety course.

NAME:

(first) (middle) (last)

ADDRESS:

PHONE: () DATE OF BIRTH: _____

DRIVER LICENSE NUMBER: STATE OF: _____

RELEASE, WAIVER AND INDEMNIFICATION

The undersigned participant and his/her parent or legal guardian (if under the age of 18 years) does hereby execute this release, waiver and indemnification for himself/herself and his/her heirs, successors, representatives and assigns; and hereby agrees and represents as follows:

To release the [sponsor's name], its members, employees, agents, representatives and those governmental agencies and other organizations affiliated with this course from any and all liability, loss, damage, costs, claims and/or causes of action, including but not limited to all bodily injuries and property damage arising out of participation in the motorcycle training course referred to above, it being specifically understood that said program includes the operation and use by the undersigned participant and others of motorcycles. The undersigned further agrees to indemnify the [sponsor's name], its employees, members, agents, representatives and those governmental agencies and other organizations affiliated with this program, and hold them harmless for any liability, loss, damage, cost, claim, judgment or settlement which may be brought or entered against them as a result of the undersigned's participation in said program. This indemnification shall include attorneys' fees incurred in defending against any claim or judgment and incurred in negotiating any settlement. It is understood and agreed that the undersigned shall have the opportunity to consent to any such settlement, provided, however, that such consent shall not be unreasonably withheld.

(Signature of Participant) (Date)

(Signature of parent of legal guardian If participant under the age of 18
years.) (Relationship)

**SAMPLE LIABILITY RELEASE USED WHEN
CIVILIANS ARE PROVIDED WITH MILITARY TRANSPORTATION**

In consideration of receiving free transportation from the U.S. Marine Corps by (type of conveyance) from (origin) to (destination). Including such other transportation by this and other means that may be reasonably required, commencing on or about (date) and ending on or about (date), I hereby release the U.S. Government, including all its subdivisions, offices, military personnel, employees, and agents from all liability for any injuries or death that may result to me from this transportation, whether caused by negligence or otherwise. I understand that in transporting me, the U.S. Government is not acting as a common carrier for hire and does not bear the liabilities attaching to that status. I acknowledge that I voluntarily accept such transportation and that I am under no compulsion to do so. I understand that by accepting such transportation, I incur no obligation to the U.S. Government except as imposed by this release. I agree that this release not only binds myself, but also my family, heirs, assigns, administrators, and executors.

Signature and date

Signature of witness/date

Signature of witness/date

UNITED STATES MARINE CORPS
MARINE CORPS BASE
CAMP PENDLETON, CALIFORNIA 92055-5001

HOLD HARMLESS AGREEMENT

In consideration of being accepted as a participant in Recreation Services, MWR, I, the undersigned (or parent/guardian of participant under 18 years of age), do hereby release and discharge the United States of America and officers and employees and other personnel of the U.S. Marine Corps, U.S. Navy, and Marine Corps Base, Camp Pendleton, California, for all claims of damages, demands, and actions whatsoever in any manner arising from or growing out of said participation.

Nothing herein constitutes a waiver of any rights I may have to medical treatment based upon my status as an active duty, dependent, retired member of the U.S. Armed Forces.

I attest and verify that I have full knowledge of the risks and danger involved in this program, and hold the government harmless for any harm, or injury, including death, sustained while participating in the said recreation program. Should emergency medical treatment be necessary during this instruction, I hereby grant consent to apply the following medical treatment to myself (child in my absence): any examination, anesthetic, medical or surgical diagnosis and/or treatment, and/or hospital care which is advised by and rendered under the general or special supervision of any duly licensed physician or surgeon. This consent is given in advance of any specific diagnosis.

Signed: _____

Date: _____

Printed Name: _____

Address: _____

Telephone Number: _____

Printed Name of Minor Participant: _____

Date of Birth of Participant: _____

Special Medical Considerations: _____

4507 **PERSONAL LIABILITY.** Commanders frequently ask about their risk of personal liability in lawsuits arising from actions they take within the scope of their official duties. These issues are easier to grasp if we break them down into the two general categories of plaintiffs and the two types of torts they are likely to complain about. Following that discussion, this chapter will address environmental law liability and private insurance issues.

4508 **TWO TYPES OF TORTS**

A. **Common Law Torts.** Common law torts are legal "wrongs" for which the victim may seek money damages in a civil court. These wrongs can be intentional or negligent. Intentional wrongs include injuries from assault, battery, slander, libel, trespass, false imprisonment, and the infliction of emotional distress. An injured person may seek money damages for injuries caused by another person who was negligent, i.e., failing to exercise a reasonable amount of care under the circumstances. Although common law torts are fairly similar, these wrongs are defined by state law and vary slightly from one jurisdiction to the next.

B. **Constitutional Torts.** These wrongs occur when a federal employee violates a person's constitutional rights. Typical complaints allege violation of the individual's First Amendment right of free expression, the Fourth Amendment right to be free of unreasonable searches and seizures, or the Fifth Amendment right to due process before being deprived of property or liberty. These suits are of relatively recent origin. The cause of action was first recognized in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). In that case, the Supreme Court held that lawsuits seeking money damages could be brought in federal court against federal employees in their individual, as well as official capacities, for alleged violations of constitutional rights.

4509 **SUITS BY MILITARY PERSONNEL**

A. **Common Law Torts.** Generally, the Government is immune from being sued. This doctrine of sovereign immunity was waived to a limited extent by the enactment of the Federal Tort Claims Act. This law gave injured people a way to seek relief from the Federal Government. In Feres v. United States, 340 U.S. 135 (1950), however, the Supreme Court held that a servicemember could not sue the Government or a fellow servicemember for common law torts committed by a servicemember in the course of activity incident to service. These injuries, whether caused by negligent or intentional acts, were deemed exempt from the waiver of sovereign immunity.

1. The Feres doctrine has been under attack in recent years. Although numerous bills to abolish the doctrine have been introduced in Congress, none have been successful. Consequently, injured servicemembers cannot sue the

United States or their fellow servicemembers for slander, libel, false arrest, assault or injuries caused by negligence which are incident to their service.

2. Injuries will generally be considered "incident to service" unless the servicemember can show they occurred off duty and off base and at a time when the servicemember was neither engaged in any military duty nor directly subject to military orders or discipline. If any one of those factors is not met, the servicemember's injury is likely to be deemed incident to service.

B. Constitutional Torts. The Feres decision left open the possibility that a servicemember could sue a fellow servicemember for a violation of constitutional rights.

1. In 1983, the Supreme Court heard a suit brought by a group of Navy enlisted men against the commanding officer of their ship. Chappel v. Wallace, 462 U.S. 296 (1983). The enlisted men alleged that the commander had violated their rights to be free of racial discrimination under the Fourteenth Amendment. The Supreme Court ruled that a servicemember could not sue a fellow member of the armed forces for a constitutional wrong. Consequently, wronged servicemembers must rely on administrative means of redressing their grievances such as requesting mast, seeking relief from the Board for the Correction of Naval Records, filing a complaint against one's commanding officer under Article 138, UCMJ (JAG Manual, Chapter 3), filing a complaint against a superior under Article 1150, U.S. Navy Regulations, etc.

2. This approach was reaffirmed in United States v. Stanley, 483 U.S. 669 (1987). While in the Army, Stanley volunteered for what was ostensibly a chemical warfare testing program. Without his knowledge, he was administered lysergic diethylamide (LSD) pursuant to an Army plan to test the effects of the drug on human subjects. Stanley suffered severe personality changes that led to his discharge and the dissolution of his marriage. The Supreme Court held that a Bivens action should be disallowed whenever the servicemember's injury is incident to service, i.e., when the Feres doctrine would bar a Federal tort claim under the circumstances. In so doing, the Court rejected Stanley's argument for a "chain of command" test.

4510 SUITS BY CIVILIAN PERSONNEL

A. Common Law Torts. In Barr v. Matteo (360 U.S. 564 1959), a high ranking federal officer (non-DoD) was sued by a group of subordinates over a press release he had made which allegedly defamed them. 360 U.S. 564 (1959). The Supreme Court recognized the potentially devastating effect on the government if such suits were allowed. Consequently, the Court held that if the individual federal defendant had acted within the "outer perimeter" of their duties, they were absolutely immune from being sued; such complaints were to be dismissed.

1. In 1988 the Court sharply limited the immunity. In Westfall v. Erwin, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988), the Court held that to qualify for absolute immunity, Federal employees had to be performing a "discretionary function" within the scope of their employment. This additional factual determination promised to open the door to extensive litigation against Federal employees and servicemembers.

2. To correct that problem, President Reagan signed the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2879 (the Act). The Act's stated purpose is "to protect Federal employees from personal liability for common law torts within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States." This law makes the United States the exclusive source of relief for individuals claiming injury or loss as a result of the commission of common law torts by Federal civilian or military employees.

3. Thus, if a civilian sues a commanding officer, or any servicemember, for a common law wrong (false imprisonment, slander, etc.), the military member will enjoy "absolute immunity" if the act which supposedly injured the civilian was committed in the scope of the servicemember's employment. Commanders sued in their personal capacity can ask for Department of Justice (DoJ) representation. These requests are forwarded to DoJ via the chain of command and OJAG (Code 34). If satisfied that the officer acted within the scope of official duties, DoJ may agree to provide representation when it is in the interests of the government to do so. As a matter of policy, DoJ will not provide representation in federal criminal proceedings. In some cases, DoJ may elect to pay for private representation. Otherwise, the cost of private counsel is borne by the employee. Representation by DoJ or an attorney paid for by the government does not relieve an employee of the obligation to pay an adverse judgment. See 28 C.F.R. Parts 15, 50.15, and 50.16.

4. The prevailing view is that federal defendants will receive more favorable treatment in a federal forum. Under 28 U.S.C. § 1442, federal employees and military personnel acting under color of their office or status may have civil and criminal actions against them in state court removed to federal district court provided there is an averment of a "federal defense." Establishing such a defense may be difficult when the act involved contravenes both state and federal environmental laws. Suits for personal injuries or property damage, however, are automatically removed from state to federal court.

5. If the Attorney General, or DoJ designee, certifies that the servicemember was acting within the scope of his office or employment at the time of the incident, the attorneys representing the servicemember will ask the court to substitute the United States in place of the individual named as the defendant. If the court approves this substitution, the defendant is taken out of the litigation and is out of the picture. Unfortunately, some courts have interpreted the Act to permit

them to re-examine the scope of employment determination made by DoJ. This area continues to evolve.

6. While the Act for the most part removes the threat to Federal employees posed by common law tort suits, the Act does not cover constitutional torts or actions brought for violation of other U.S. laws, e.g., environmental statutes. It is unlikely that Congress will provide legislative relief in these areas, discussed below. Personnel served with process for official acts should report the matter immediately to their commanding officer, command SJA, the general litigation division of OJAG (Code 34) at (703) 325-9870 or AV 221-9870, and OGC litigation office (703) 602-3176 or AV 332-3176.

B. Constitutional Torts. Some federal employees enjoy absolute immunity against constitutional wrongs in their official capacities, e.g. judges, prosecutors, witnesses, and convening authorities. The typical commander enjoys only "qualified immunity" against suits brought by civilians for constitutional wrongs. To obtain this qualified immunity, the military defendant must show that he did not violate a constitutional right which a reasonable person knew, or should have known, existed. In addition, the Supreme Court recently established a roadblock across a popular avenue of constitutional lawsuits against Federal employees. In Schwelker v. Chilicky, 487 U.S. 412 (1988), the Court made it clear that civilian employees cannot bring suits alleging constitutional torts as a substitute for existing administrative remedies for resolving civilian personnel disputes. Consequently, the range of likely constitutional torts brought against commanders in their personal capacity was significantly limited.

4511 **CIVIL LIABILITY FOR ENVIRONMENTAL LAW VIOLATIONS.** Most recent environmental statutes contain provisions that permit assessment of civil penalties for violation of environmental laws. In addition, commanders may be liable under state tort law if their actions cause injury to others, such as suits for health problems from contaminated wells, etc. As a practical matter, their exposure is limited at present as long as they are acting within the scope of their duties.

A. At present, EPA does not seek civil penalties against federal agencies or federal employees. EPA's support for legislation that would change this policy suggests changes may be in the offing. Some states have sought civil penalties against agencies and could conceivably seek penalties against commanding officers.

B. The threat of personal liability varies from statute to statute. The Clean Air Act and the Clean Water Act, two of the primary environmental media statutes, specifically protect individuals acting within the scope of their official duties from civil penalties. In sharp contrast, the Resource Conservation and Recovery Act (RCRA) contains no similar protection. RCRA governs the disposal of hazardous waste, a problem facing every installation commander.

C. Damage suits for pollution from Navy vessels in navigable waters may be exclusively limited to suits in Admiralty against the United States. This avoids the personal liability exposure presented by state tort suits against individuals

D. Some environmental laws authorize citizens to sue to compel officials to take action. The court may award attorney's fees to the prevailing litigant. As these are suits against an employee in an official, rather than private, capacity, these fees would be paid by the government.

4512 **CRIMINAL LIABILITY FOR VIOLATION OF ENVIRONMENTAL LAWS.** Commanders are subject to most state environmental laws unless compliance would make it impossible to carry out specific federal duties. Commanders are assumed to know and expected to comply with environmental laws. Many federal and state prosecutors, believing that environmental compliance takes precedence over the mission accomplishment, are increasingly looking to criminal penalties. Criminal enforcement mechanisms in environmental statutes are typified by easily satisfied mental elements and stiff penalties.

A. The Mental Element. Most statutes provide for felony and misdemeanor prosecutions, depending on severity of violation and mental element. Some statutes, e.g., the Clean Water Act, provide criminal sanctions for "negligent" violations. Other environmental statutes, e.g., the Rivers and Harbors Act, 33 U.S.C. §§ 401-466n (1982), impose strict liability, requiring proof only of the act. Even for a felony, proof of a "knowing" violation means only that the defendant knew a certain activity, e.g., disposal, was occurring, NOT that the action violated a certain statute. Commanders may be held liable if they breach a duty to ensure that violations are avoided; it need not be their hand that turned the valve. Nor can commanders avoid liability by sticking their head in the sand; courts are unsympathetic to the "intentionally ignorant."

B. Penalties. Environmental statutes carry hefty criminal penalties. For example, conviction under RCRA's provision for "knowing endangerment" of another by mishandling hazardous waste carries a maximum punishment of a \$250,000 fine and 15 years' imprisonment; negligent discharges under the CWA carry a \$25,000 fine and 1 year in jail. The amended federal sentencing guidelines will result in more jail sentences for environmental crimes.

C. Procedural Limitations. Under Mesa v. California, 489 U.S. 121, 103 L.Ed.2d 99 (1989), federal officials cannot remove a state prosecution to federal court unless their federal duties required them to break the law. As discussed above, representation by DOJ is rarely available in federal criminal cases, and probably not in most state criminal cases unless there is a federal duty required breaking the law.

D. Avoiding Prosecution. Prosecutors are unlikely to bring a criminal case where the deterrent value is low. This is especially true where a commander

has done everything possible to achieve compliance. Commanders must ensure that all levels of the command understand the commitment to comply with environmental laws. The first step is to assess the command's compliance status. The commander must then take the necessary actions to get into compliance, document the efforts, and request additional resources if necessary. Counterproductive activities such as failing to report leaks and falsification of data merely invite prosecution.

4513 **PRIVATE INSURANCE.** Whether an officer should obtain private professional liability insurance is a personal decision. For the vast majority of naval personnel, however, such insurance is not warranted.

A. For those who feel their circumstances may invite suits against them personally, e.g., suits by civilians asserting illegal searches or detention or other violations of civil rights, private professional liability insurance is available. Coverage may be purchased for adverse judgments, costs, and attorney fees in non-criminal cases arising out of the performance of official duties. In the event DoJ elects to pay for private representation, this insurance can cover attorney fees in non-criminal proceedings to the extent such fees are not fully reimbursed by the government.

B. Homeowners policies and personal liability umbrella policies customarily exclude risks associated with professional activities. Insurance will not provide coverage against criminal or civil penalties or the costs of defending a criminal action. Consequently, the utility of private insurance on account of risks associated with environmental compliance is doubtful. Prospective buyers should examine the policy terms closely.

C. The best "insurance" is to embrace the following guidance:

1. Promote the philosophy that environmental compliance is a part of mission;
2. know the applicable requirements;
3. staff, organize and train to ensure compliance;
4. use the environmental compliance evaluation program;
5. respond promptly to notices of violation;
6. correct discrepancies and negotiate compliance schedules with regulators in a spirit of cooperation;
7. keep the chain of command informed;

8. request assistance promptly if problems cannot be resolved with available resources;
9. use the pollution control report (PCR), baserep, casrep, pom and command correspondence to identify funding requirements;
10. document dealings with regulators;
11. select and reward managerial personnel who excel at inter-governmental relations; and
12. maintain accountability and address problems promptly and candidly.

4514 **ADDITIONAL READING.** For a detailed examination of this subject, see: Commander Larry D. Wynne, JAGC, USN, "A Case for Criminal Enforcement of Federal Environmental Laws," 38 Naval L. Rev. 105 (1989); Major R. Craig Anderson, USAF and Major Robert T. Lee, USAFR, "Private Party Actions Against Federal Officials for Environmental Wrongs," 31 Air Force L. Rev. 31 (1989); Major John J. Bartus, USAFR, "Federal Employee Personal Liability Under Environmental Law: New Ways for the Federal Employee to Get in Trouble," 31 Air Force L. Rev. 45 (1989).

MWR/NAFI ISSUES

4515 **MORALE WELFARE AND RECREATION (MWR)**

A. MWR/NAFI References

1. DoD Directive 1015.1, Establishment, Management, and Control of Nonappropriated Fund Instrumentalities
2. DoD Directive 1015.6, Funding of Morale, Welfare, and Recreation Programs
3. SECNAVINST 7510.7C, Funding of Morale, Welfare, and Recreation (MWR) Programs
4. Guidebook for Navy Commercial Sponsorship Opportunities
5. SECNAVINST 5720.44A, Public Affairs Policy & Regulations
6. SECNAVINST 5370.2J, Standards of Conduct and Government Ethics

7. DoD Instruction 1000.15, Private Organizations on DoD Installations
8. NAVCOMPT Manual, Vol 7, Chap 5, Part E
9. DoD Instruction 1015.2, Operational Policies for MWR Activities

B. Purpose of MWR Activities. Morale, Welfare and Recreation (MWR) activities operate to enhance military effectiveness of Navy and Marine Corps by fostering esprit de corps, camaraderie, friendship, physical well being, professional education attainment and constructive use of leisure time among the active duty community and other authorized patrons. Many stringent rules apply particularly rules regarding money, e.g., the standards of conduct and NAVCOMPT provisions. The congressional reduction of appropriated funds for MWR programs and the concomitant encouragement to put MWR programs on a more self-sufficient basis has put a lot of pressure on these organizations. Despite that pressure, these actions were not intended to encourage or to authorize MWR activities to raise MWR funds by any means possible.

C. Staffing. The local MWR Programs Director oversees NAFL employees who are ordinarily civilian personnel paid with nonappropriated funds. MWR activities may use active-duty personnel in some circumstances, both on and off duty, as well as retirees. Restrictions on dual pay, dual compensation, and preferential hiring practices apply. Individuals directly involved in the solicitation and sponsorship award recommendations must have Confidential Statements of Affiliation and Financial Interests (DD Form 1555) on file.

D. Categories of MWR Activities. Categories of MWR activities are based on their primary purpose, major characteristics, and the principal program they support.

1. Mission Sustaining Activities. This category has little or no capacity to generate nonappropriated fund revenues; it is almost entirely supported by appropriated funds. Nonappropriated funds are used only when the use of appropriated funds is prohibited by law, or it is essential to operation of activity. Examples include gyms, libraries, and intramurals.

2. Basic Community Support Activities. Closely related to the first category, the primary focus here includes dependents as well as active duty members. Activities in this category can generate some limited nonappropriated fund revenues. Examples include child development centers, youth activities, and crafts and automotive shops.

3. Enhanced Community Support Activities. This category is similar to Basic Community Support in the sense that it fosters community spirit.

Activities in this category have the ability to generate substantial nonappropriated fund revenues that should cover major operating expenses but not the entire cost. Examples include open messes/clubs, recreational equipment rentals

4. Business Activities/Supplemental Mission Activities. Activities in this category must be predominately self-sustaining with only indirect support from appropriated funds. All NAFI policies and procedures apply. Examples include resale activities, golf courses, package stores, and marinas with private boat berthing.

E. Examples of MWR Proposals Found to be Legally Objectionable. Innovative and well-meaning, some MWR activities go beyond the legal limits in their efforts. Recent examples include: large scale Christmas tree farm with sales to Navy exchanges; providing fee parking to general public; and high stakes bingo games at clubs.

F. Commercial Sponsorship. By ASD (FM&P) memorandum of 29 February 1988, DoD established a commercial sponsorship program to assist in what the gurus call "event marketing." This bright exception to the general rule against solicitation may help MWR activities sponsor quality events but it is not a panacea. The commercial sponsorship program can fund such programs as sporting or fitness events; teams and competition; music and entertainment events; festivals; and other special events. The key word is event; commercial sponsorship is not intended as a general fundraising tool. Residual revenues from events, however, may be used for any authorized expenses within local MWR program.

1. Restrictions. The commercial sponsorship program is highly regulated. SJAs should consult the pertinent directives for the minutiae but some of the major restrictions include:

- a. No solicitation of alcoholic beverage or tobacco sponsorship (may accept unsolicited under certain circumstances);
- b. Only sponsorships from U.S. firms, or foreign corporations having U.S. subsidiaries, may be solicited and accepted;
- c. Firm must supply or produce consumer products or services, not solely military hardware;
- d. Solicitation must be competitive (no informal solicitation and only MWR Commercial Sponsorship Coordinators may solicit);
- e. Must not be a gift or donation;

- f. No joint sponsorship may be indicated in the title of the event (must use a disclaimer to avoid implication that DoN endorses the sponsor or their product or services);
- g. No exclusive arrangement, e.g., "Dr. Nut is the Official Soft Drink of the 1992 Norfolk 10K Fit for Life Run."

2. SJA Role. Of all MWR activities, the commercial sponsorship program has perhaps the most significant legal side. SJAs, particularly those with a sense for business, can do a lot to support the program and ensure it runs lawfully. In particular, drafts of contracts must be reviewed by local JAG or General Counsel. A boilerplate contract is outlined in the NMPC publication "Guidebook for Naval Commercial Sponsorship Opportunities."

4516 PRIVATE ORGANIZATIONS

A. Background. Several years ago a Navy civilian employee who was a member of a roller skating club molested several club members. Navy authorities had allowed the privately-owned club to practice and occasionally perform aboard base. Many military dependents were among the members. Parents of the victims filed claims against the United States under the Federal Tort Claims Act (FTCA). More recently, another civilian employee of the Navy and his family were burned when a bag of gunpowder exploded in their car. The employee had purchased the gunpowder from a fellow member of a gun club authorized to conduct activities aboard base. The club had military and non-military members. The injured persons have filed claims against the United States under the FTCA, as well as a lawsuit against the club's officers and individual members. The claims and lawsuit are pending.

B. Theory of Liability. In these cases and others, claimants have asserted that certain organizations are agencies of the United States, and that the organizations' employees or members who caused the injuries were acting within the scope of their federal employment. Under this theory, the injured parties look to the United States, not the individual club members, for compensation. In most cases we can analyze claimants' assertions by applying a few basic principles.

1. NAFIs. The courts examining these cases focus on the concept of nonappropriated fund instrumentalities (NAFIs). Generally speaking, a NAFI is an organization not supported primarily by recurring appropriations from the U.S. Treasury. When these nonappropriated fund activities are essential or integral to the mission of a military service and the control exerted by the service is more than casual, they are considered federal agencies. Examples of such activities are Navy exchanges; officer and enlisted clubs; open messes; ships stores and swimming pools. United States v. Holcombe, 277 F.2d 143 (4th Cir. 1960); Brewer v. United States, 108 F.Supp. 889 (M.D. Ga. 1952); Grant v. United States, 271 F.2d 651 (2nd Cir.

1969); Standard Oil v. Johnson, 316 U.S. 481 (1942). When an activity is neither integral to the mission of a service nor subject to direct service control, the activity should not be considered a federal agency.

2. Criteria. The cases of Woodside v. United States, 606 F.2d 134 (6th Cir. 1979), Eckles v. United States, 471 F. Supp. 108 (M.D. Pa 1979), and Scott v. United States, 226 F.Supp 864 (M.D. Ga 1963) give useful examples of criteria courts have used to decide whether an organization is an integral part of the military establishment. These criteria include: who chooses the officers or directors of the organization; who promulgates the rules and regulations governing the organization; whether the military service directly supervises the operation of the organization; and whether the organization sponsors activities which develop skills useful to the service's mission. Scott is the only reported case denying liability because the "NAFI" was found not to be an agency of the United States.

C. Regulations. The following service directives address private organizations aboard DoD installations and should be reviewed: DOD Instruction 1000.15 (September 22, 1978), MCO 5760.4B (28 September 1988), and NAVCOMPT Manual (2 April 1970) par. 075261. These directives discuss the concept of the "private organization," a term denoting a self-sustaining, non-Federal entity, established and operated on board a federal installation with written consent of the commander by individuals acting exclusively outside the scope of their official capacity as employees of the United States. The directives establish how and under what conditions a private organization may operate aboard a DoD installation; for example, a written charter and liability insurance are required. Some logistical support from appropriated sources is permitted; but holding of ownership interests in private organization property by appropriated and nonappropriated instrumentalities is prohibited. Further, these directives specifically state private organizations are neither instrumentalities of the United States, nor integral parts of the military organization. In this way the directives attempt to distinguish private organizations from nonappropriated fund instrumentalities courts have determined are an integral part of the military departments and agencies of the United States.

D. SJA Action. What appears to be a "private organization" may actually be a nonappropriated activity or organization. You should therefore review the cases and get the facts about a particular organization's establishment and operation; locate its charter and by-laws and learn how it actually operates. Use the facts you have gathered to make your decision about the character of the organization. You should also consider seeking an opinion about the character of the organization or function from the NMPC or CMC, as appropriate. If you determine the organization is a federal agency, effective control should be exercised over it, and risk management procedures should be implemented to minimize the Navy's liability. If it is private, the organization and its members should be advised about their liability and insurance requirements.

1. Advising Private Organizations. Some members or employees of organizations you determine to be "private organizations" rather than nonappropriated activities may disagree with your determination. "Private organizations" occasionally neglect to maintain sufficient liability insurance to cover the negligent acts of their members or employees. In some cases, state law provides individual members are jointly liable for the acts of other members. In this event, be prepared to deal with requests for DoJ representation from members or employees who believe or assert they were acting on behalf of the United States.

2. Claims Analysis. Finally, the claim must be examined carefully to determine its perspective: Is the claimant asserting only that the organization is a federal agency and that the member or employee caused injury in the scope of employment? Or, is the claimant also saying the United States failed to properly supervise the activities of an admittedly private organization? In the latter case, analysis will extend beyond the issue of whether the organization is a federal agency.

FAMILY ADVOCACY

4517 REFERENCES

- A. DoD Directive 6400.1
- B. SECNAVINST 1752.3
- C. OPNAVINST 1752.2
- D. MEDCOMINST 6320.22
- E. MCO 1752.3
- F. COMDINST 1750.7
- G. The Navy Family Advocacy Program: Legal Deskbook, developed by Robert Horowitz, J.D.

4518 INTRODUCTION. The Family Advocacy Program (FAP), is a line managed program designed to address the prevention, evaluation, identification, intervention, treatment, follow-up and reporting of child and spouse maltreatment, sexual assault and rape. While most other identified with child sexual abuse, the program also deals with such forms of abuse as neglect (deprivation of emotional and physical necessities) and physical abuse--areas in which education and intervention have proven to be a successful means of addressing the problem. DoD has established Family Advocacy Programs (FAP's) DoD-wide. Each service must have its own program and provide Family Service Centers (FSC's) to help minimize further

trauma to the victims of family violence. Since family violence is a complex and multidisciplinary problem, it requires the involvement and coordination of many agencies and services. The Family Advocacy Officer (FAO) is responsible for the coordination of all the nonmedical aspects of the FAP. Given the existence of the helpful desk reference (G) above, this chapter will merely provide an overview of the program and highlight the substantive issues typically faced by the SJA.

4519 PREVENTION AND DETERRENCE. The FAP seeks to prevent family maltreatment by establishing and maintaining education and awareness programs that contribute to healthy family life, encourage voluntary self-referral, and break the cycle of abuse through identification and treatment. The FAP enhances awareness through the area Family Advocacy Committee (FAC) which is made up of representatives from relevant agencies and organizations, e.g. the FSC. The FAP deters illegal activities through knowledge that administrative or disciplinary action will be taken when appropriate.

4520 IDENTIFICATION. All personnel have a duty to report suspected or known cases of abuse and neglect in accordance with local reporting laws. Military personnel will report such matters to the FAR, who in turn will report the incident to the appropriate civilian agencies -- usually child protective services (CPS's). If the FAR is not available, the report should be made directly to the CPS. Medical treatment facilities (MTFs) must also report abuse to the sponsor's CO within 48 hours. The FAR serves as the point of contact between the reporting source (the FAR subcommittee) and the local agencies. The applicable subcommittee reviews each case and reaches a consensus on its status. Each installation must have a written MoU with the local CPS agency defining investigative responsibilities.

4521 VOLUNTARY SELF-REFERRAL. Self-referral is encouraged, since the goal of FAP is to prevent or break the cycle of abuse. An admission of abuse is sufficient to substantiate a FAP case and requires notification of the member's CO and the FAR, unless the admission is otherwise privileged, e.g., attorney-client. If the CO determines the self-referral was voluntary, the member's disclosures may not be the sole basis for disciplinary action or characterizing a discharge as OTH. (In the Coast Guard, the CO must seek the guidance of a law specialist.) Thus, processing after voluntary self-referral should be for a type warranted by service record (TWSR) characterization of service. Disciplinary action and use in characterization can be based on independent evidence. A self-referral is not voluntary if the member does so knowing that the victim has or will be reporting the matter. Self-referrals should be made to the FAR, CAA, DAPA, FSC counselor, CO, or XO. Due to the potential privilege problem, chaplains should not be used for self-referral purposes but should be involved in other aspects of the FAP. Unfortunately, few cases of abuse are self-referrals. The majority of cases come to the CO's attention through police or hospital reports, allowing the information provided to be used in administrative and disciplinary proceedings.

4522 REPORTING. FAP personnel must comply with local laws on the reporting of child or spouse abuse. Coordination and cooperation between all military and civilian agencies is required. Substantiated cases and suspected cases (without identifying data) are to be reported to Navy-Marine Corps Family Advocacy Central Registry by the Family Advocacy Representative (FAR) for filing in their central registry. The Coast Guard submits its report to Commandant (G-PS-2), using CG-5488. Reporting to civilian agencies will normally be done through the FAR. Some of the FAR's reporting requirements include:

A. **Procedures.** All cases must have a completed DD 2486 (Child/Spouse Abuse Incident Report) forwarded to the Commanding Officer, Naval Medical Data Services Center (Code 42) within 15 days of the date the CRS makes a status determination or closes, transfers, or reopens the case. Enclosure (9) of NAVMEDCOMINST 6320.22 Series pertains. Cases with a status determination of "suspected" must be updated within 12 weeks to either substantiated; unsubstantiated, did not occur; unsubstantiated, unresolved, or at risk.

B. **Death Cases.** Spouse or child maltreatment cases resulting in death require special DOD-mandated reporting procedures. Suspected and substantiated cases involving death must be reported, in writing, to BUMED-343, with a copy sent to Commanding Officer, Naval Medical Data Services Center, as soon as possible after the CRS makes its initial status determination regarding the case. Enclosure (11) of NAVMEDCOMINST 6320.22 outlines the information the FAR must gather and type, or legibly write, on a separate sheet of paper. This report, labeled "Family Advocacy Report of Death," will be attached to the completed DD 2486. The FAR should be aware that, in these cases, it is possible the only source of initial information regarding such cases may be the local newspaper. Rather than awaiting a referral in these cases, the FAR will have to take the initiative in seeking the necessary information. Each death case, if not involved in an already active case, must be opened as any other case.

C. **Child Care Facility Cases.** Cases which involve suspected child sexual abuse in a DoD-sponsored or sanctioned child care facility of DoD-sponsored or sanctioned program of any kind (e.g., church group, scouting program, recreational activity, child care home, etc.) involve an additional reporting requirement per DoD Directive 6400.2. These cases must be reported to BUMED, BUMED-343, not later than 72 hours after receipt of the referral. Also, in cases on Navy installations, COMNAVMILPERSCOM (NMPC-663) must be notified. In cases occurring on Marine Corps installations, the Commandant of the Marine Corps (Code MHF) must be notified. Enclosure (10) of NAVMEDCOMINST 6320.22 outlines the information the FAR must gather before reporting. Reports can be made by telephone or message.

4523 INTERVENTION. A servicemember's CO has many intervention options in family violence cases. Since each case is unique, intervention action (if

taken) needs to be tailored to each case. Prior to intervention, if time permits, coordination with the legal officer, the FAR, and the appropriate subcommittee are encouraged. Some of the options are:

A. Temporarily remove the military member from the home (if the CO restricts the person to the barracks or the ship, it must be clear that this is not for UCMJ purposes but for protection of the victim to avoid speedy-trial problems);

B. Through MoU's with civilian agencies, establish cooperative intervention along with a safe house or other overnight accommodations to protect the victims and provide shelter;

C. Issue various types of protective orders, e.g., ordering the member not to have any contact with the victim without prior authorization;

D. In the case of a nonmilitary abuser, bar the person from the base base housing area or seek (through the FAR) a protective order from a civilian court; and

E. In overseas areas or isolated CONUS sites where state agencies are unavailable to assist in providing social services, fashion a tailored remedy by appropriate military authority. In foreign countries, ensure that the remedy does not conflict with the SOFA. If no local court is willing to take jurisdiction, and the immediate transfer of the family to CONUS is not possible, the following actions may be taken:

1. In child maltreatment cases, have an emergency FAC subcommittee review the situation and recommend appropriate action (such actions may include having NIS or medical personnel interview the child without parental consent, temporarily removing the child from the home, or admitting the child to the MTF without parental approval);

2. In family violence situations requiring medical care not locally available, the member or family may be transported to a location that can provide the care if recommended by the FAC subcommittee; or

3. In situations where the abuse has been substantiated by the subcommittee and the CO recommends the family be returned to CONUS, a message must be sent to the appropriate service headquarters -- NMPC-4 or USMC HQ Code MMOS -- in Washington for authorization with an information copy provided to BUMED. In the Navy, NMPC-663 and BUMED-343 make recommendations to NMPC-40 as to where the servicemember should be assigned in the U.S.

4524 **ADVERSE PERSONNEL ACTIONS.** Providing assistance to abusers under the FAP shall not, in and of itself, be the basis for adverse actions -- such as punitive action; removal from base housing; revoking or removing security

clearances, Personnel Reliability Program (PRP), enlisted classification code, or warfare specialty. Swift intervention and disciplinary action is an effective deterrent to family violence, but the following must be considered:

A. When the member is judged treatable and has potential for further effective service, the Navy's interests, justice, and the family victim may be better served by taking disciplinary action and then suspending the sentence while the member is being treated. If the evidence suggests substance abuse, the member should be referred for screening and possible treatment.

B. Factors militating in favor of disciplinary or administrative action include the member's refusal to acknowledge or assume responsibility for the behavior; the compulsive nature of the behavior; the seriousness of the victim's injury; and the ability and willingness of potential government witnesses to testify.

4525 **REHABILITATION.** The MTF is responsible for determining the need for treatment and for the referral to other professional resources as needed. The primary goal of the FAP is to protect the victim and provide treatment for **ALL** involved family members. Treatment is generally subject to a one-year limitation. Some cases are not amenable to treatment, e.g., certain pedophiles. In these cases, ADSEP processing should be considered.

A. Counseling/treatment is recommended when the member has a positive record of performance and good potential for treatment. At the same time, appropriate disciplinary action should be considered unless there is a "bona fide" voluntary self-referral or, based on the facts of the case, it is determined that only therapy is needed to stop the abuse/neglect, protect the victim, and improve family function.

B. If the member repeats the offense, fails to cooperate, fails to progress or satisfactorily complete treatment, disciplinary or administrative action may be taken (including the vacating of any previously suspended punishments).

C. Upon successful completion of treatment, a member's case will be considered closed. Treatment is considered successful when the abuse or neglect has stopped, the problems contributing to the maltreatment have been remedied, and it is determined that no further maltreatment will occur.

4526 **MANAGEMENT OF INCEST CASES.** In incest cases in which the abuser has an outstanding record of military service and rehabilitation has been recommended, the abuser and family should be afforded the option of treatment. While undergoing treatment, the member will be retained in the service. If the member fails to complete the year-long treatment program or commits new offenses, treatment will be suspended and ADSEP processing and possible UCMJ action may also take place. After successful completion of treatment, the member may be

retained in the service. This does not preclude UCMJ action but consideration should be given to suspending punishment, especially any punitive discharge. Administrative discharge processing in incest cases varies between the services.

A. Navy. The option to retain is the result of both the FAP and a change to the MILPERSMAN, Article 3610200, which requires mandatory processing for sexual perversion. In incest cases, CNMPC makes the final determination as to processing for separation or retention and treatment, and the commanding officer of the servicemember may not commence ADSEP processing without CNMPC approval. NMPC will base its decision on a number of factors, including: the CO's recommendation; the member's record of performance; the treatment prognosis; and whether the case was a self-referral.

B. USMC. The Marine Corps has a similar policy to that of the Navy in incest cases, BUT the initial processing determination will be decided at the GCMA level. The same criteria for determining whether to process for separation or retain and treat, however, applies.

C. Coast Guard. Coast Guard policy on processing and retention is similar to the Navy and USMC. If the CO wants to retain and place the member into long-term treatment, however, the case must be forwarded to Commandant (G-PE) or (G-PO) who will review the matter and consider the recommendations of Commandant (G-PS). The Coast Guard requires this review in **ALL** abuse cases.

4527 **STATE CHILD ABUSE REPORTING LAWS.** All state child abuse reporting laws require the local CPS agency to receive and investigate reports of suspected child maltreatment and offer rehabilitation services to CPS families. State law specifies who is required to report suspected maltreatment, who is exempt from reporting and/or testifying, and the penalties for not reporting. The military is required to comply with these laws when such abuse is discovered in the course of performance of duties. Reporting shall normally be done via the FAR. Even voluntary self-referrals must be reported by the FAR if the state so requires, creating a situation where, although the military is precluded from prosecuting, the civilian authorities could prosecute if they so desired.

4528 **THE JUDGE ADVOCATE'S ROLE.** Successful intervention in cases of family violence requires a multi-disciplinary response involving the collaboration and cooperation of many DON professionals. The SJA's involvement in the FAP is critical. The SJA can expect to play a significant role in a variety of scenarios. SJAs may become involved in setting up the case management system for an installation or command. They may assist in writing MOUs to guide interaction between the installation and state and local child protective services agencies, law enforcement agencies, juvenile courts, and other civilian agencies. This coordination often takes place within the Area Family Advocacy Committee which should include a judge advocate. In addition, SJAs may help develop SOPs for responding to

reported cases of family maltreatment in cooperation with the installation CO and the Area FAC. The SJA assists the commander in using legal action as a lever to prod abusers into treatment and help balance punishment of perpetrator with the needs of children and families. The SJA must get involved quickly. Most family violence cases rely upon circumstantial evidence, and such evidence may be overlooked, lost, mishandled or misinterpreted without legal guidance. SJAs, perhaps via a legal assistance attorney, will assist in legal actions to protect victims, e.g., a local spouse abuse shelter house, local attorney to obtain a civil protection order, child protective service agency, etc.

4529 P: INTS OF CONTACT

- A. Navy. Navy Military Personnel Command (NMPC 663), AUTOVON 224-1006; OJAG AUTOVON 221-9752 or commercial (703) 325-9752; E-mail JAGFAP.
- B. Marine Corps. CMC (Code MHF), AUTOVON 224-2895.
- C. Coast Guard. Commandant (G-PS), (202) 267-2237

PART V – MILITARY JUSTICE

CHAPTER 51

GENERAL PRELIMINARY MATTERS

MILITARY JUSTICE MANAGEMENT

5101 GENERAL MANAGEMENT SUGGESTIONS

- A. It is essential to maintain cooperative relationships with CO XO, division officers, personnel office, disbursing office, and MAA's. This is not so much camaraderie as a working cooperation for keeping each other informed and ensuring service record entries are made, pay stops and starts as appropriate, division officers have input to the discipline process, witnesses are available as necessary, performance evaluations are prepared on time, an accused has necessary uniforms, and evidence is handled properly.
- B. Must keep well organized, pay attention to details, maintain good files, and stay current
- C. Need good subordinates (may seek assistance from NLSO Law Center for training subordinates)
- D. Military justice should be firm but fair
- E. Communicate with NLSO/LSSS
 - 1. Find out time and documentation preferred for Booker and ADSEP advice
 - 2. Consult frequently with TC
 - 3. Maintain contacts with legal assistance office
- F. Library must be current
 - 1. Manual for Courts-Martial, 1984, JAG Manual, PAYPERSMAN, MILPERSMAN, applicable instructions, notices, messages

2. Applicable force regulations/instructions (e.g., Sixth Fleet Legal Manual - get it before you deploy to Mediterranean)
 3. Applicable local instructions (e.g., evidence handling, search authorization, urinalysis, desertion)
 4. Make sure admin office has you on routing for all changes and updates
- G. Keep adequate supply of blank forms (e.g., charge sheets, confinement orders, report chits, page 6's, page 7's, consent forms, rights warnings, claims forms) - especially before deployment
- H. CCU/brig list must be current at all times
1. This can also be used as your reminder for letters to IRO and requests to retain prisoners in PTC for more than thirty days
 2. Send a weekly list to department heads for CCU/brig visits
- I. Status lists (pending courts-martial, discharges, JAG Manual investigations, and claims)
- J. Tickler system for periodic reports (e.g., monthly post-trial review status, annual Privacy Act report, triennial FOIA report, disciplinary statistics report)
- K. Admiralty matters (JAG Manual, chap. XII). Shipboard (non-Government employee) civilian injuries must be investigated and reported to OJAG
- L. Overseas
1. Foreign criminal jurisdiction
 2. Foreign claims
 3. Liberty ports
 4. Liberty risk program
 5. Customs declarations
- M. Indebtedness complaints - M'LPERSMAN 6210140, Ch. 7 of LEGAD-MINMAN

- N. Nonsupport complaints - MILPERSMAN 6210120, Ch. 8 of LEGAD-MINMAN
- 5102 DESERTION (example of shipboard procedure)
- A. 24 hours
1. Obtain service record
 2. Start page 6
- B. Ten days
1. Memo reminding division to inventory personal effects and send you copy of inventory receipted by supply department or memo from division officer specifically stating that the deserter left no personal effects aboard
 2. Letter to next-of-kin
- C. Thirty days
1. Deserter message
 2. Mail DD Form 553
 3. Obtain health, dental, and pay records
 4. Collect evidence (e.g., witness statements, pending ICR's and other documentation of pending disciplinary matters, restriction order, relevant message traffic)
 5. Prepare charge sheet. Charge absence as a violation of Art. 85, UCMJ. Prefer and receive charges.
 6. Copy anything important (e.g., charge sheet (certify true), right side of service record, page 6, performance evaluations, last LES, restriction order (certify true), relevant messages)
- D. 180 days
1. Service, health, dental, and pay records to NMPC

2. Original page 6 OCR, original charge sheet, original restriction order are sent with service record
 3. Retain deserter file onboard
- E. Return of deserter
1. Returner deserter message. Include Finance Center as addressee, with specific request for outstanding pay and leave balances.
 2. Keep personnel office, disbursing office, and department head informed
 3. Convert deserter file to court-martial case file
- F. Cross-reference outstanding deserter list and alpha roster with EDVR

5103

MAST/OFFICE HOURS

- A. Maintain log book tracking each report chit (i.e., report initiated, sent to division (for investigation and completion of rights form, have someone in division initial receipt in log book), return to legal (dismissed, EMI, or XO screening), sent to XO (dismissed, XOI, to CO), return to legal (Booker if shore command), mast office hours (dismissed, NJP))
- B. Coordinate with division and with MAA's to ensure witnesses and division representative will be present
- C. Have CO record NJP and sign
- D. Post mast/office hours
1. Post-mast yeoman standing by with appellate rights form
 2. Know in advance who may need page 13 warning counseling
 3. Service record entries should be made without delay
 4. Be prepared for confinement at CCU
- E. Maintain UPB
1. Original report chit with NJP signed by CO

2. Record of mast/office hours proceeding
3. All documents considered by CO
4. Original, signed and dated, rights warning statements
5. Copies of service record entries
6. Copies of appeal, endorsements, and responses (originals in NJP appeal correspondence file)

5104 COURTS-MARTIAL

- A. Convening orders, drafting charges, service record review
- B. Status list
- C. Case file
 1. Copy right side of service record and performance evaluations
 2. ICR's, NIS reports, miscellaneous writings (such as letter from Mom or from accused while UA), relevant messages, memo to division officer, etc.
 3. Chronology recording when events occurred, such as delivery to NLSO, DC called about sanity issue, you called finance center, NMPC, or civilian police (with whom you spoke and what was said)
- D. Work closely with TC
 1. Serve accused when he is aboard
 2. Supply sufficient copies of charge sheet, etc.
 3. Ensure that service record entries are accurate
 4. Make DC work through TC
- E. Accused works for command, not for DC
 1. Use check-in check-out chits for visits to DC, and retain them in case file

2. Conversely, work with division officer and disbursing office to ensure that command fulfills its responsibilities (e.g., accused is paid if so entitled, personal effects returned, brig visits, accused's family has POC)

F. Work with division officer

1. Advise that accused is in brig, or may be going to brig or may be transferred after trial; that will need to get sea band in order (onboard, not off-base); that will need transfer performance evaluation reflecting SPCM conviction (to be completed after trial, of course)
2. Keep division informed of changes in trial date and results of trial
3. Keep witnesses informed of when needed (work with TC)

G. If accused still attached to command when CA action taken, ensure service record entries are made (including page 13 warning/counseling, if appropriate). If not, ensure promulgating order forwarded to accused's new command.

H. Trial team at sea

1. Message NLSO to get trial teams. Follow format in applicable legal manual, especially noting companion cases and prior attorney-client relationships.
2. Make special efforts to accommodate attorneys
 - a. For each case, prepare case file folders marked TC, DC, or MJ, which include the charge sheet and convening order. For counsel, include lists of witnesses, LPO, LCPO, division officer, and their phone numbers. TC's folder should include all applicable reports with copies he may provide to DC.
 - b. Provide temporary work space, a private space (stateroom) where DC may interview clients, and a space for courts-martial (wardroom)
3. Coordinate trial team visit with battle group JA, if possible
4. Ask NLSO LSSS to provide legal assistance, ADSEP advice, Boeker advice for SCM's

I. Notes on SCM's

1. Use good officers and prepare SCM package yourself, so that busy officers will be more cooperative
2. Provide a copy of the trial guide with plastic covers and a grease pen
3. Maintain separate case files as with other courts-martial
4. Ensure that service record entries are made, including page 13 Booker waivers and page 13 counseling/warnings, if appropriate
5. Inform division officer of trial results

5105

SERVICE RECORD ACCOUNTABILITY

- A. There should be a single service record monitor in your office who should be kept informed of all service records entering or leaving the office. He can prepare an update list daily and should inventory the service records in the office regularly.
- B. No service record should leave your office without a record transmittal sheet dated and receipted by the transmittee (disbursing, admin. personnel, division, NLSO, registered mail clerk, etc.) and retained by your service record monitor

PRELIMINARY INQUIRIES

5106 PURPOSE OF PRELIMINARY INQUIRIES.

R.C.M. 303 requires the commander, upon receipt of charges or information indicating that a member of the command has committed an offense punishable under the UCMJ to direct a preliminary inquiry into the case sufficient to permit an intelligent disposition of the matter. This may consist only of an examination of the charges and a summary of the expected evidence which accompanies them, while in other cases it may involve a more extensive investigation.

5107 **USE.** The preliminary inquiry report (PIR) is of utmost importance to the proper administration of military justice. The PIR is used initially by the commander in determining the proper disposition of the case. Options include dismissal of the charge(s), imposition of nonpunitive measures, nonjudicial punishment, referral to trial by court-martial, and referral to a formal pretrial investigation. If the commander determines nonjudicial punishment to be appropriate, the PIR will be of assistance in determining the accused's guilt or innocence and the amount of punishment to be imposed. In the event of an appeal from nonjudicial punishment, the PIR will assist the appellate authority in deciding whether relief is warranted. If the case is referred to trial by court-martial or to a formal pretrial investigation, the PIR will assist the summary court-martial officer, counsel for both sides, or a pretrial investigating officer in preparing to discharge their duties.

5108 **ACTION.** In many commands, the XO will be the officer who, upon receipt of information indicating an offense has been committed by a member of the command, determines who should investigate the case. The XO is guided by SECNAVINST 5520.3_ in making this determination. It may be expedient for more than one case to be assigned to the same person for concurrent investigation where the cases are closely related. Preliminary inquiry officers will proceed per the instructions which follow. In each case, the XO will review the report of the preliminary inquiry officer and may remand the report for further investigation where appropriate.

5109 **ADDITIONAL INFORMATION.** The following pages contain a set of instructions to guide preliminary inquiry officers and useful forms to aid them in the performance of their duties: PIO report form; witness statement form; and suspect statement form.

INSTRUCTIONS FOR PRELIMINARY INQUIRY OFFICERS

1. The preliminary inquiry officer (PIO) will conduct an investigation by executing the following steps substantially in the order presented below. The report of investigation will consist of the following:

- a. NAVPERS 1626/7, Report and Disposition of Offense(s);
- b. an Investigator's Report Form (The sample form following these instructions provides a chronological checklist for conducting the preliminary inquiry);
- c. statements or summaries of interviews with all witnesses (sworn statements will be obtained if practicable);
- d. statements of the accused's supervisor(s), sworn if practicable;
- e. originals or copies of documentary evidence;
- f. if the accused waives all rights, a signed sworn statement by the accused; or a summary of interrogation of the accused, signed and sworn to by the accused; or both; and
- g. any additional comments by the investigator as desired.

2. Objectives

a. The PIO's primary objective is to collect all available evidence pertaining to the alleged offense(s). As a first step, the PIO should be familiar with those paragraphs in Part IV of the Manual for Courts-Martial, 1984, describing the offense(s). Within each paragraph is a section entitled "elements," which lists the elements of proof for that offense. The PIO must be careful to focus on the correct variation. The elements of proof should be copied down to guide the PIO in searching for the relevant evidence. The PIO is to consider everything which tends to prove or disprove an element of proof.

b. The PIO's secondary objective is to collect information about the accused which will aid the commander in making a proper disposition of the case. Items of interest to the commander include: the accused's currently assigned duties; evaluation of performance; attitudes and ability to get along with others; and particular personal difficulties or hardships which the accused is willing to discuss. Information of this sort is best reflected in the statements of the accused's supervisors, peers, and the accused himself.

3. Interrogate the Witnesses First. In most cases, a significant amount of the information must be obtained from witnesses. The person initiating the report and the persons listed as witnesses are starting points. Other persons having relevant information may be discovered during the course of the investigation.

a. The PIO should not begin by interrogating the accused. If guilty, the accused is the person with the greatest motive to lie. The interrogator should meet with the accused last, when thoroughly prepared. Even when the accused confesses guilt, the PIO should, nevertheless, collect independent evidence corroborating the confession.

b. Witnesses who have relevant information to offer should be asked to make a sworn statement. Where a witness is interviewed by telephone and is unavailable to execute a sworn statement, the PIO must summarize the interview and certify it to be true.

c. In interviewing a witness, the PIO should seek to elicit all relevant information. One method is to start with a general survey question, asking for an account of everything known about the subject of inquiry, and then following up with specific questions. After conversing with the witness, the PIO should assist in writing out a statement that is thorough, relevant, orderly, and clear. The substance must always be the actual thoughts, knowledge, or beliefs of the witness; the assistance of the PIO must be limited to helping the witness express himself accurately and effectively in a written form.

4. Collect the Documentary Evidence. Documentary evidence such as Shore Patrol reports, log entries, watchbills, service record entries, local instructions, or organization manuals should be obtained. The original or a certified copy of relevant documents should be attached to the report. As an appointed investigator, the PIOs have the authority to certify copies to be true by subscribing the words "CERTIFIED TO BE A TRUE COPY" with their signature.

5. Collect the Real Evidence. Real evidence is a physical object, such as the knife in an assault case or the stolen camera in a theft case, etc. Before seeking out the real evidence, if any, the PIO must be familiar with the Military Rules of Evidence concerning searches and seizures. If the item is too big to bring to a nonjudicial punishment hearing or into a courtroom, a photograph of it should be taken. If real evidence is already in the custody of a law enforcement agency, it should be left there unless otherwise directed. The PIO should inspect it personally.

6. Rights Advisement

a. Before questioning the accused, the PIO should also have the accused sign the acknowledgement line on the front of the Report and Disposition of Offense (NAVPERS 1626 7) and initial any additional pages of charges that may be attached.

The PIO should sign the witness line on the front of NAVPERS 1626/7, next to the accused's acknowledgment.

b. A form follows which may be used to ensure the PIO correctly advises suspects of their rights before asking any questions. Filling in that page must be the first order of business when meeting with the suspect. Only one witness is necessary, and that witness may be the PIO.

7. Interrogate the Accused. The accused may be questioned only after knowingly and intelligently waiving all constitutional and statutory rights. Such waiver, if made, should be recorded on a copy of the Suspect's Statement form which follows. If the accused asks questions regarding the waiver of these rights, the PIO must decline to answer or give any advice on that question. The decision must be left to the accused. Other than advising the accused of the rights as stated in paragraph 6b above, the PIO should never give any other form of legal advice to the accused. If the accused wants a lawyer, NLSO judge advocates are available.

a. If the accused has waived all rights, the PIO may begin questioning. After the accused has made a statement, the PIO may probe with pointed questions and confront the accused with inconsistencies in the story or contradictions with other evidence. The PIO should, with respect to his own conduct, keep in mind that if a confession is not "voluntary," it cannot be used as evidence. To be admissible, a confession or admission which was obtained through the use of coercion, unlawful influence, or unlawful inducement is not voluntary. The presence of an impartial witness during the interrogation of the accused is recommended.

b. If the accused is willing to make a written statement, ensure the accused has acknowledged and waived all rights. While the PIO may help the accused draft the statement, the PIO must avoid putting words in the accused's mouth. If the draft is typed, the accused should read it over carefully and be permitted to make any desired changes. All changes should be initialed by the accused and witnessed by the PIO.

c. Oral statements, even though not reduced to writing, are admissible into evidence against a suspect. If the accused does not wish to reduce an oral statement to writing, the PIO must attach a certified summary of the interrogation to the report. Where the accused has made an incomplete written statement, the PIO must add a certified summary of matters omitted from the accused's written statement which he stated orally.

d. If the accused initially waives all rights, but during the interview indicates a desire to consult with counsel or to stop the interview, the PIO will scrupulously adhere to such request and terminate the interview. The interview may not resume unless the accused approaches the PIO and indicates a desire to once again waive all rights and submit to questioning.

INVESTIGATOR'S REPORT IN THE CASE OF _____

1. Read paragraphs in MCM concerning offenses/charges. _____
2. Witnesses interviewed (not the accused).

NAME	PHONE	Signed statement	Summary of interview

4. Documentary evidence:

Description	Original or copy	Attached or location

INVESTIGATOR'S REPORT IN THE CASE OF _____

5. Real evidence:

Description	Name of Custodian	Custodian's Phone number

6. Permit the accused to inspect Report Chit. Yes _____ No _____
7. Accused initialed second page of charges. N/A _____ Yes _____ No _____
8. Accused signed Acknowledgement line on NAVPERS 1626/7. Yes _____ No _____
9. Investigator signed witness line on NAVPERS 1626/7. Yes _____ No _____
10. Accused waived rights. Yes _____ No _____
11. Accused made statement (only when #10 is Yes), and
Accused's signed statement attached _____
Summary of interrogation attached _____

WITNESS' STATEMENT

Social Security No.

Division

TAD from/to _____ until _____

Phone

I, _____, hereby make the following statement to _____, who has been identified to me as a preliminary inquiry officer for the _____.

(use additional pages if necessary)

I swear (or affirm) that the information in the statement above (and on the _____ attached page(s), all of which are signed by me) is true to my knowledge or belief.

(Witness' Signature)

(Date)

(Time)

Sworn to before me this date.

Investigator's Signature) _____ (Date) _____ 19____ (Time) _____

[Obtain SSNs from official records: if member asked to provide SSN, obtain a signed Privacy Act statement.]

SUSPECT'S RIGHTS ACKNOWLEDGMENT/STATEMENT_____
(Date)_____
Full Name (Accused/suspect)_____
Social Security No._____
Grade/Rate_____
Interviewer_____
Social Security No._____
Grade/Rate**RIGHTS**

I certify and acknowledge by my signature and initials set forth below that, before the interviewer requested a statement from me, he/she warned me that:

- (1) I am suspected of having committed the following offense(s):

- (2) I have the right to remain silent; Initial ____

- (3) Any statement I do make may be used as evidence against me in trial by court-martial; Initial ____

- (4) I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at no expense to the United States, or, if I wish, Navy or Marine Corps authority will appoint a judge advocate to act as my counsel without cost to me, or both;
Initial ____

- (5) I have the right to have such retained civilian lawyer and or appointed judge advocate present during this interview. Initial ____

WAIVER OF RIGHTS

I further certify and acknowledge that I have read the above statement of my rights and fully understand them. Initial ____
Further, _____

(1) I expressly desire to waive my right to remain silent;
Initial _____

(2) I expressly desire to make a statement; Initial _____

(3) I expressly do not desire to consult with either a civilian lawyer retained by me or a judge advocate appointed as my counsel without cost to me prior to any questioning Initial _____

(4) I expressly do not desire to have such a lawyer present with me during this interview Initial _____

(5) This acknowledgment and waiver of rights is made freely and voluntarily by me, and without any promises or threats having been made to me or pressure or coercion of any kind having been used against me. Initial _____

(6) I further understand that, even though I initially waive my rights to counsel and to remain silent, I may, during the interview, assert my right to counsel or to remain silent. Initial _____

Signature (Accused/suspect)

Time

Date

Signature (Interviewer)

Time

Date

Signature (Witness)
Date

Time

The statement which appears on the following _____ page(s), all of which are signed by me), is made freely and voluntarily by me, and without any promises or threats having been made to me or pressure or coercion of any kind having been used against me.

Signature (Accused suspect)

REQUEST FOR LEGAL HOLD

From: Commanding Officer,

To: Commanding General, Marine Corps Base, Camp Lejeune
(Attn: SJA)

Subj: REQUEST FOR LEGAL HOLD IN THE CASE OF U.S. V.

1. The following personnel have been identified as victims/witnesses in the subject case:

Name	Rank	SSN	Unit	RTD
------	------	-----	------	-----

2. I request that the personnel listed above be placed on legal hold to ensure their presence for trial.

3. The request for legal services in the subject case (was) (will be) forwarded to the Office of the Staff Judge Advocate (on) (not later than)

19 .

Signature

SAMPLE REQUEST FOR LEGAL SERVICES

From: Commanding Officer, _____
To: Staff Judge Advocate

Subj: REQUEST FOR LEGAL SERVICES IN THE CASE OF

Ref: (a) BO P5810.1E

Encl: (1) Preliminary Inquiry
(2) SNM's SRB
(3) Prisoner Data Information Sheet

1. Per the reference, I request that you draft appropriate charges and specifications based upon the information contained in enclosures (1) through (3), and detail the appropriate personnel to provide any necessary further assistance.

2. The charge or charges against the accused are to be referred to:

() an Article 32 Investigation

() a special court-martial

() a summary court-martial, convening order serial number
dated .

3. The following special instructions are provided:

() BCD is (not) authorized

() Confinement is (not) authorized

() Nonlawyer assistant trial counsel is
Duty phone .

() Nonlawyer assistant defense counsel is
Duty phone .

4. The accused has undergone the following forms of pretrial restraint:

() restriction in lieu of arrest since .

() pretrial confinement since at

☐ confinement by civilian authorities from u n t i l

☐ None.

5. Witnesses are:

Names	Rank	EAS	Unit	Work Phone	Legal Hold Initiated
-------	------	-----	------	------------	----------------------

6. Accused:

Section	Phone Number	OIC
---------	--------------	-----

7. If the accused requests administrative separation with an OTH discharge in lieu of trial by court-martial (GOS), I recommend
☐ approval ☐ disapproval.

8. My legal officer will notify your office of any change in the status of the accused's pretrial restraint.

9. By copy hereof, (assistant trial counsel) (and) (assistant defense counsel) are directed to immediately contact the Military Justice Section (MJ Chief: 2704 5687/3619) to arrange to speak to the appropriate detailed counsel.

Signature
(By direction)

Copy to:
ATC
ADC

NONPUNITIVE MEASURES

5110 **INTRODUCTION** The term "nonpunitive measures" is used to refer to various leadership techniques which can be used to develop acceptable behavioral standards in members of a command. Nonpunitive measures generally fall into three areas: nonpunitive censure, extra military instruction (EMI), and administrative withholding of privileges. Commanding officers and officers in charge are authorized and expected to use nonpunitive measures to further the efficiency of their commands.

5111 **NONPUNITIVE CENSURE.** Nonpunitive censure is nothing more than criticism of a subordinate's conduct or performance of duty by a military superior. This form of criticism may be either oral or in writing. When oral, it often is referred to as a "chewing out"; when reduced to writing, the letter is styled a "nonpunitive letter of caution" (NPLOC). A sample NPLOC, per the format in JAG Manual Appendix A-1-a, appears at the end of this chapter. NPLOCs are private in nature. With the sole exception of NPLOCs issued by SECNAV, copies may not be forwarded to the NMPC or CMC. In addition, NPLOCs may not be quoted in or appended to fitness reports or evaluations, included as enclosures to JAG Manual or other investigative reports, or otherwise included in the recipient's official departmental records. JAG Manual § 0105b(2). The deficient performance of duty or other underlying facts CAN be mentioned, however, in the recipient's next fitness report or enlisted evaluation, so long as no reference is made to the NPLOC.

5112 **EXTRA MILITARY INSTRUCTION (EMI).**

The term "extra military instruction" (EMI) is used to describe the practice of assigning extra tasks to a servicemember who is exhibiting behavioral or performance deficiencies for the purpose of correcting those deficiencies through the performance of the assigned tasks. Typically, these tasks are performed in addition to normal duties. EMI involves an order from a superior to a subordinate to do the task assigned. To be a lawful order, the EMI must have a legitimate training purpose.

A. **Imposing EMI.** The initial step in analyzing EMI in a given case is to properly identify the subordinate's deficiency, i.e., shortcomings of character or personality, rather than merely the outward manifestation, which may be overcome with EMI. Once the deficiency has been identified correctly, the superior can assign a LOGICALLY RELATED task to correct it. Tasks which are not logically related to the deficiency will likely be deemed punishment. An order delivered in tempered language will more likely reflect the training goal rather than retaliatory actions associated with punishment.

B. EMI Quantity. EMI may still be construed by the courts as punishment if the quantity of instruction is excessive. Per the JAG Manual, no more than two hours of instruction should be required each day; instruction should not be required on the individual's Sabbath; the duration of EMI should be limited to a period of time required to correct the deficiency; and, after completing each day's instruction, the subordinate should be allowed normal limits of liberty. As valid training, EMI can lawfully interfere with normal liberty hours. One should not confuse this type of training with a denial of privileges (discussed later), which cannot interfere with normal hours of liberty. The commander must also be careful not to assign instruction at unreasonable hours. What "reasonable hours" are will differ with the normal work schedule of the individual involved, but no great interference with normal hours of liberty should be involved.

C. Authority to Impose EMI. The authority to assign EMI to be performed DURING working hours is not limited to any particular rank or rate, but is an inherent part of the authority vested in officers and petty officers. The authority to assign EMI to be performed AFTER working hours rests in the commanding officer or officer in charge, but may be delegated but generally not below the chief petty officer level. OPNAVINST 3120.32B, para. 142.2.a. For NCOs, see the Marine Corps Manual, para. 1300. Any superior may withdraw subordinate authority to assign EMI during working hours; the commander OIC may withdraw the authority to assign EMI after working hours. Per JAG Manual § 0111b, Reservists on IDT may not be required to perform EMI outside normal periods of IDT.

D. EMI Cases

1. United States v. Trani, 1 C.M.A. 293, 3 C.M.R. 27 (1952) (Order given to a prisoner to perform close order drill was valid as a corrective measure to cure a want of discipline and self-control where the prisoner had burned certain confinement records).

2. United States v. Roadcloud, 6 C.M.R. 384 (A.B.R. 1952) (Order to perform close order drill at 2230 was punishment).

3. United States v. Raneri, 22 C.M.R. 694 (N.B.R. 1956) (Order to take a parachute and deposit it properly in each area of the hangar and to announce to those present, each time, that this was the proper way to deposit a parachute was punitive).

4. United States v. Robertson, 17 C.M.R. 684 (A.F.B.R. 1954) (Order to draw cleaning gear at 1600 to clean his spaces after normal cleaning hours was punitive).

5. United States v. Reeves, 1 C.M.R. 619 (A.F.B.R. 1951)(Mowing lawns not logically related to any observed deficiency).

5113 **DENIAL OF PRIVILEGES.** A third nonpunitive measure which may be employed to correct minor deficiencies is denial of privileges. A "privilege" is a benefit provided for an individual's convenience or enjoyment. JAGMAN, § 0104a. Denial of privileges is a more severe leadership measure than either censure or EMI because denial of privileges does not necessarily involve or require an instructional purpose. Per JAG Manual § 0104, privileges that may be withheld include such things as special liberty, 72-hour liberty, exchange of duty, special command programs, access to base or ship movies, access to enlisted or officers' clubs, hobby shops, and parking privileges. It may also encompass such things as withholding special pay and commissary and exchange privileges, provided such withholding complies with applicable rules and regulations, and is otherwise lawful. Authority to withhold a privilege rests with the person empowered to grant that privilege. Authority to withhold privileges of personnel in a liberty status is vested in the commanding officer or officer in charge.

5114 **USE OF ALTERNATIVE VOLUNTARY RESTRAINTS OR SELF-DENIAL OF PRIVILEGES**

A. Self-Imposed Restriction. The offer to an individual, as an alternative to formal punishment or reporting of misconduct, to withhold action, if he will voluntarily restrict himself or accede to an order that is beyond the authority of the superior to give (also known as "putting him in hack" is unenforceable and not sanctioned as a nonpunitive measure.

B. I.D. Cards. The common practice of withholding the I.D. card as a nonpunitive measure to keep the person around is unauthorized. Per MILPERSMAN 4620150.1 and paragraph 1004 of MCO P5512.11, I.D. cards must be carried at all times by all military personnel, and are to be surrendered only for identification, investigation, or while in disciplinary confinement. Orders to surrender the I.D. card to enforce restriction orders are unlawful. United States v. Rao, No. 78-0537 (N.M.C.M.R. 25 Sep. 1978.)

C. Precedent. In three cases, C.M.A. has held that the UCMJ does not authorize deprivation of an individual's liberty except as punishment by court-martial or NJP without a clear necessity for such restraint, either as pretrial restraint or in the interest of health, welfare, discipline, or training.

1. United States v. Haynes, 15 C.M.A. 122, 35 C.M.R. 94 (1964)(Order restricting the accused for an indefinite period due to prior misconduct, for which the accused had been tried, was held illegal punishment).

2. United States v. Gentle, 16 C.M.A. 437, 37 C.M.R. 57 (1966).

An order to the accused to sign in hourly to enforce a restriction to the base "so that he would be present for duty during normal working hours," was held to be illegal punishment).

3. United States v. Wallace, 2 M.J. 1 (C.M.A. 1976)(Order placing

accused in company arrest to ensure his presence for duty each day was held illegal; breach of the arrest limits would not support a charge of breaking arrest).

SAMPLE EMI ASSIGNMENT ORDER

(Date)

From: (Rate and full name of person imposing EMI)

To: (Rate and full name of person being assigned EMI)

Subj: ASSIGNMENT OF EXTRA MILITARY INSTRUCTION (EMI)

Ref: (a) JAG Manual § 0103 [or local instruction]

1. Your performance indicates the following deficiencies: [you failed to make required log entries to record certain events and failed to make proper tours of your watch area.]
2. These performance deficiencies stem from: [your inattention to duty in preparing for your assigned watch.]
3. Per the reference, the following extra military instruction is assigned to assist you in overcoming these deficiencies: [you will study the pertinent orders for watchstanders and develop a checklist for use by personnel standing this watch.]
4. This EMI shall be performed between 1630 and 1800 from Monday 1 June 19CY through Friday 5 June 19CY. On Monday, 8 June 19CY, you will present a 30-minute class on this subject to your division.

(Signature)_____
(Date)

1. I hereby acknowledge notification of the above EMI. I have read and understand reference (a) and am aware that failure to perform said EMI in the manner set out therein is a violation under Article 92, UCMJ which is punishable by either non-judicial punishment or at court-martial.

(Signature)

Copy to:
Members' Training Record (original)
Command Master Chief
Legal Officer
Division Officer

SAMPLE NONPUNITIVE LETTER OF CAUTION

From: Commanding Officer, USS BOHEMIAN (CV 11)

To: CTOCS Michael Stipe, USN, 123-45-6789

Subj: NONPUNITIVE LETTER OF CAUTION

Ref: (a) Report of JAG Investigation of 7 Sep 1987

(b) JAGMAN § 0105

(c) RCM 306(c)(2), MCM 1984

1. Reference (a) is the record of investigation convened to inquire into the transmission of a certain message on board USS BOHEMIAN while you were SSES Assistant Division Officer.

2. The investigation disclosed that as Assistant Division Officer, on 19 July 19CY, you participated in the writing and printing of a fake message. After reviewing the fake message, you noted that there had been an unauthorized modification to the classification line and directed that it be corrected. Unfortunately you failed to verify that this correction had been made, and when the correction was not made, the next message still had the error in the classification line. When you realized that this message had been transmitted with an error in the classification line, you took steps to transmit a corrected copy, but you did not notify your superiors.

3. Your performance and judgment during this incident was substandard. As Assistant Division Officer, it was inappropriate for you to participate in the drafting of a fake message. More critical, however, was your failure to notify your superiors that a message with an improper classification line had been transmitted. You are hereby administratively admonished for your actions on 19 July 19CY.

4. This letter, being nonpunitive in nature, is addressed to you as a corrective measure. It does not become a part of your official record. You are advised, however, as Assistant SSES Division Officer you are in a position of special trust. In the future, I expect you to exercise greater care in the performance of your duties in order to measure up to the high standards of USS BOHEMIAN. I trust the instructional benefit you receive from this experience will heighten your awareness of the extent of your responsibilities and help you become a more proficient Chief Petty Officer.

E. D. BRICKELL

SAMPLE LETTER OF INSTRUCTION

From: Commanding Officer, USS NEVERSAIL (CV 11)
To: LCDR Mike Rowmanage, USN, 987-65-4321/1300
Aviation Fuels Officer, USS NEVERSAIL (CV 11)

Subj: LETTER OF INSTRUCTION

Ref: (a) MILPERSMAN 3410100

1. This Letter of Instruction is issued per the reference to discuss specific measures required to improve the unsatisfactory performance of the Aviation Fuels Division on board NEVERSAIL.

2. Since your assumption of duties as Aviation Fuels officer on board NEVERSAIL, you have allowed unauthorized procedures to exist in the Aviation Fuels Division that resulted in the structural damage to JP-5 storage tank 8-39-2J during underway replenishment on 18 July 19CY. You failed to familiarize yourself with appropriate Aviation fuels directives and thus you were unable to verify the proceedings in your division. You also failed to ensure all directives were maintained up-to-date. Generally, you relied totally upon you Assistant Aviation Fuels officer for the day to day operation of your division.

3. To function effectively as the Aviation Fuels Officer, you must become more involved in the day to day aspects of your division. You cannot manage from your office, accepting the counsel of your assistants without developing an adequate personal knowledge of specific procedures. You must personally set your division's goals and personally verify they are being met.

a. You must review every Aviation Fuels directive applicable to USS NEVERSAIL. You will ensure that you are familiar with directed procedures. As a matter of routine, you will personally verify that your division does not deviate from directed procedures unless authorized by higher authority.

b. You will submit quota requests for yourself and CWO2 J. S. Ragmann to attend an Aviation Fuels Officer course upon completion of this deployment.

4. This letter is designed to aid you in correcting deficiencies in your performance as a Division Officer. The entire chain of command is available to assist you in anyway possible. We want and need your success.

D. R. PEPPER

CHAPTER 52

DISPOSITION OF MINOR OFFENSES

NONJUDICIAL PUNISHMENT

5201 USN CHECKLIST FOR REPORT CHIT/NJP

PROCESSING. The following process assumes that the command has a local report chit or system for reporting offenses and conducting the preliminary inquiry prior to the preparation of a NAVPERS 1626/7 for use at XOI or CO's mast.

A. Before CO's Mast

1. Log local report into the logbook. (A log should be used for tracking the report through your command.)
2. Send local report and request for preliminary inquiry and recommendation as to disposition to SNM's department head.
3. If returned recommending XOI or mast, check service record out from personnel or PSD.
4. Review service record to ensure all pages are there and to determine if SNM is on any suspended sentence, is in a frocked paygrade, or has been given an administrative separation warning.
5. Prepare NAVPERS 1626 7 and appropriate acknowledgement of rights forms from JAG Manual. If a UA case, be sure to have a page 601-6R or page 13.
6. Attach preliminary inquiry report, including statements and other evidence, to report chit.
7. Contact and inform the accused of all rights and let him/her inspect the evidence. (If shore based, set up appointment with defense counsel if accused wants to consult with counsel.)
8. Inform accused, his supervisors, and witnesses of time and place of XOI/CO's mast.

B. After CO's Mast

1. Ensure CO has completed section of NAVPERS 1626/7 entitled "Action of the Commanding Officer."
2. Inform accused of right to appeal NJP. Be sure accused signs the appropriate forms (see JAG Manual, appendix 1). Ensure NAVPERS 1626/7 is modified to reflect the 5-day time limit vice 15 days which is preprinted on NAVPERS 1626/7.
3. Service record entries required when the commanding officer EXCUSES or DISMISSES the offense(s):
 - a. When the service record contains an entry concerning UA, an entry must be made to show what action was taken. If the UA is less than 24 hours, a page 13 entry is required.
 - b. If UA more than 24 hours, completion of a page P601-6R is required.
 - c. For all other offenses EXCUSED or DISMISSED, no service record entry is required. If UA offense excused or dismissed, page 13 required to reflect disposition.
4. When mast results in a decision to refer charges to trial by summary or special court-martial, prepare a charge sheet (DD458). No service record entry is required.
5. When mast results in a decision to refer charges to a pretrial investigation under article 32, no service record entry is required.
6. Required service record entries if punishment imposed does NOT include reduction or forfeiture of pay:
 - a. NAVPERS 1070 613 (Page 13)
 - b. NAVPERS 1070.609 (Page 9)
 - c. NAVPERS 1070/606 (Page 6) - Must be completed in UA cases in excess of 24 hours. Since UA of 24 hours or more is lost time, completion of the page 6 (blocks 1 and 2, 38 through 42, and block 50) must be timely and

accurate. Strict adherence to the PAYPERSMAN, § 90435 is mandatory.

7. Required service record entries if punishment imposed DOES include reduction or forfeiture of pay:
 - a. NAVPERS 1070/607 (Page 7)
 - b. NAVPERS 1070/609 (Page 9)
 - c. NAVPERS 1070/604 (Page 4) if reduction is awarded.
 - d. NAVPERS 1070/606 (Page 6) to be completed in UA cases in excess of 24 hours as outlined above.
 - e. If reduction and forfeitures, ensure forfeitures are based on reduced paygrade (even if reduction suspended).

Note: Manual of Advancement states that all lost time as a result of UA, sick, misconduct, confinement, etc., is not creditable as time in rate (TIR) for advancement and, accordingly, the TIR shall be adjusted (Page 4), ONLY if there has been NO REDUCTION IN RATE!

8. Punishments involving reduction, or forfeiture of pay which are suspended:
 - a. NAVPERS 1070/613 (Page 13) if punishment awarded pertains to RIR or FF and was suspended.
 - b. NAVPERS 1070/607 (Page 7) if one or more types of punishment awarded is suspended, but still includes at least one punishment not suspended that pertains to pay.
 - c. NAVPERS 1070/609 (Page 9) if reduction is awarded.
 - d. NAVPERS 1070/604 (Page 4) if reduction is awarded.
9. Punishments involving restraint:

- a. Correctional custody. If CC is awarded at mast, prepare the confinement order (NAVPERS 1640/4). You will need an original and two copies.

Note: The accused will be escorted to the local medical facility for a preconfinement physical. This is a function of your master-at-arms. They are trained to do this. Do not assign the job to one of your YNs.

- b. Restriction to limits. If restriction is imposed, restriction papers need to be typed. Usually this is on a local preprinted form, necessitating only the completion of the accused's name, rate, and social security number. It will show the boundaries of restriction, times, dates and places for muster, and is signed by someone authorized to do so.
- c. Extra duty. If extra duty is imposed, virtually the same procedures as in b. above will be used. Again, notification is by preprinted locally prepared form which defines the extra duty, the time it will be accomplished, to whom the accused reports, and any extra instructions necessary.
- d. Confinement on bread and water. Prepare confinement orders for bread and water. The SNM must be given a confinement physical and found to be fit for confinement on bread and water. See section on preparation of confinement order.
- e. File documents in UPB and, after all action (including any appeal), ensure it is complete.

[A "Unit Punishment Book" is nothing more than a binder containing completed NAVPERS 1626/7's of ALL cases appearing before the CO at MAST, whether dismissed or excused. The unit punishment book is required as a permanent command record of all cases involving ENLISTED persons handled at mast and will be maintained on board for 2 years (MILPERSMAN 5030500 and JAGMAN, § 0119 pertain).]

10. Remission, mitigation, or setting aside of NJP

- a. The PAYPERSMAN (Part 9, section 90436) contains block-by-block instructions for preparation of NAVPERS 1070/607 for these actions.
- b. Refer to table 9-4-39h for instructions to mitigate, reinstate, or set aside the punishment for members who have previously been reduced in rate.

C. Miscellaneous Matters

1. If the CO's NJP results in a restraint-type punishment, the details must be furnished to the OOD for inclusion in the deck log.
2. Prepare notice for POD. If it is the policy of commands to publish the results of CO's NJP in the command POD, strict compliance with JAGMAN, § 0115 is mandatory. The names of offenders be omitted if the information may be disseminated to civilians. In no instance will the social security number of an individual be used in the publication of NJP results. (See SECNAVINST 5211.5 series and the Privacy Act in this Deskbook.)
3. If appropriate, prepare page 13 -- warning member of consequences of future misconduct.
4. If a basis for administrative discharge applies, determine if command wants to process member for discharge.

D. NJP Appeals

1. After receipt of accused's appeal, prepare written endorsement for the CO's signature. Include a copy of NAVPERS 1626/7, copies of all statements or evidence used at mast, and copy of page 9 from accused's service record (with all endorsements). See JAGMAN, § 0116 for requirements.
2. Indicate appeal on NAVPERS 1626/7.
3. If no response to appeal is received from appeal authority within 5 days of accused's appeal, then restraint punishments must be stayed if accused's has requested this.

E. Officer NJP

1. Before taking an officer to NJP, check with regulations promulgated by the type commander regarding any additional requirements or procedures required by them. (Many want notification prior to the NJP hearing. CINCPACFLT commands must have a prompt verbal report of all incidents of officer misconduct to CINCPACFLT)
2. If an officer is awarded NJP, then a disciplinary report must be sent to NMPC 82. (MILPERSMAN 3410100.2b contains the applicable provisions.)
3. If the officer is also being detached for cause, consult MILPERSMAN 3410105 for the provisions for this procedure.
4. See "Officer Discipline" in this Deskbook.

OFFICER DISCIPLINE

5202 REFERENCES

- A. SECNAVINST 1920.6_
- B. MILPERSMAN
- C. MCO P5800.8_ (LEGADMINMAN)

5203 **REPORTS OF OFFICER MISCONDUCT.** Naval officer misconduct must be reported to NMPC-82. Marine officer misconduct must be reported to CMC (JAM) in the following instances:

- A. The suspect is in the grade of colonel or above;
- B. the suspect is a commander with special court-martial convening authority; or
- C. in the judgment of the superior commander:
 - a. the incident in question may generate significant adverse publicity;
 - b. formal disciplinary action or a recommendation for administrative separation processing may result; or
 - c. other special circumstances warrant notifying CMC.

5204 **ADMINISTRATIVE SEPARATION.** SECNAVINST 1920.6_ governs the administrative separation processing of Regular and Reserve officers. The most frequently used bases for administrative separation processing are: misconduct, including moral or professional dereliction; and substandard performance of duty. Retirement-eligible officers may also be processed for administrative separation. SECNAVINST 1920.6_ provides the mechanism to force the retirement of eligible officers for substandard performance or misconduct, including a board procedure to determine whether retirement should be in the next inferior grade. These procedures are discussed in greater detail in the administrative separations chapter of this Deskbook.

5205 SEPARATION IN LIEU OF TRIAL

A. Basis. An officer may be separated in lieu of trial by court-martial upon the officer's request if charges have been preferred with respect to an offense for which a punitive discharge is authorized. This provision may not be used as a basis for separation when the escalator clause of R.C.M. 1003(d), MCM, 1984, provides the sole basis for a punitive discharge, unless the charges have been referred to a court-martial authorized to adjudge a punitive discharge.

B. Characterization of Service. The characterization of service is normally under other than honorable (OTH) conditions, but a general discharge may be warranted in some cases. Characterization of service as honorable is not authorized, unless the respondent's record is otherwise so meritorious that any other characterization would be clearly inappropriate.

C. Procedures

1. The officer submits a signed, written request for discharge in lieu of trial. The officer shall be afforded an opportunity to consult with qualified counsel. If the member refuses to do so, the commanding officer shall prepare a statement to this effect which shall be attached to the file, and the officer shall acknowledge the waiver of the right to consult with counsel. Unless the officer has waived the right to counsel, the request shall also be signed by counsel.

2. The written request shall indicate the officer understands the following:

- a. The elements of the offenses charged;
- b. that characterization of service under other than honorable conditions is authorized; and
- c. the adverse nature of such a characterization and possible consequences.

3. The request shall also include:

- a. An acknowledgement of guilt of one or more of the offenses charged, or of any lesser included offense, for which a punitive discharge is authorized; and
- b. a summary of the evidence or list of documents (or copies thereof) provided to the officer pertaining to the offenses for which a punitive discharge is authorized.

SAMPLE NOTIFICATION OF OFFICER NJP1621
17
Date

From: Commanding General, 1st Marine Aircraft Wing
To: First Lieutenant John J. Jones 123 45 6789/1369 USMC

Subj: NOTIFICATION OF OFFICE HOURS HEARING

Ref: (a) MCM, 1984 Part V
(b) JAG Manual 0109
(c) Article 15, UCMJ
(d) SECNAVINST 1920.6A
(e) MCO P1900.16D

1. Per references (a), (b), and (c), I am considering imposing nonjudicial punishment on you.

2. The following advice is provided:

a. You are suspected of the following violation(s) of the Uniform Code of Military Justice:

(1) Article 117, UCMJ: Provoking Speeches and Gestures. In and around the Bachelor Officers Quarters (BOQ) Building 4138 at Plaza Housing, Okinawa, Japan, on or about 15 July 19CY, you wrongfully used provoking words, to wit: "Bitch" and "Go to hell," or words to that effect, and gestures, to wit: balling up your fists, towards Sergeant Green, USMC, a military policeman in the execution of her duties.

(2) Article 134, UCMJ:

(a) Specification 1. Drunk and Disorderly. In and around the BOQ, at Building 4138 at Plaza Housing, Okinawa, Japan, on or about 15 July 19CY, you were drunk and disorderly with military policemen in the execution of their duties, which conduct was of a nature to bring discredit upon the armed forces.

(b) Specification 2. Drunk and Disorderly. In Okinawa City, Okinawa, Japan, on or about 16 July 19CY, you were drunk and disorderly with both Japanese policemen and military policemen in the execution of their duties, which conduct was of a nature to bring discredit upon the armed forces.

b. You will receive a copy of the preliminary inquiry which contains the available documentary information upon which the allegations are based;

c. You do not have to make any statement concerning the allegations;

d. Any statement you do make may be used against you during nonjudicial punishment, in a trial by court-martial, or in an adverse administrative proceeding convened pursuant to references (d) and (e);

e. You may consult with a lawyer, either a civilian lawyer retained by you at no expense to the United States or a judge advocate at no expense to you if one is reasonably available; and

f. You will receive a hearing during which you will be accorded the following rights:

(1) To be present before the officer conducting the hearing; or, if you waive such personal appearance, to submit written matters for consideration;

(2) To be advised of the offenses of which you are suspected;

(3) To be advised that you cannot be compelled to make any statement regarding the offenses alleged and that any statement you do make can be used against you;

(4) To be present during the presentation of all information against you. Copies of any written statements will be furnished to you;

(5) To have available for your inspection, all items of information to be considered by the officer conducting the hearing;

(6) To present to the officer conducting the nonjudicial punishment, appropriate matters in mitigation, extenuation, or defense of the alleged charge(s). Matters in mitigation do not constitute a defense but do reduce the degree of culpability. Such matters might include a fine military record, either before or after the alleged offense. Matters in extenuation are matters which render an offense less aggravated. Such matters do not constitute a defense. Matters in defense are matters which constitute a reason in law or in fact why you should not be found guilty of the allegation; and

(7) To present reasonably available witnesses;

(8) To have, during the hearing, a personal representative speak on your behalf. The officer conducting the hearing has no obligation to obtain and arrange for the presence of such representative. It is your obligation to obtain and

arrange for the presence of such personal representative. The personal representative need not be a lawyer;

(9) To have the proceedings open to the public unless good cause for closing the proceedings can be shown or the punishment to be imposed will not exceed restriction for 14 days and an oral reprimand; and

(10) To request to confer privately with the officer conducting the hearing.

g. If nonjudicial punishment is imposed, the maximum punishment authorized is:

(1) Letter of Admonition or Reprimand;

(2) Arrest in Quarters for not more than 30 consecutive days;

(3) Forfeiture of not more than one-half pay per month for two months; and

(4) Restriction to specified limits, with or without suspension from duty, for not more than 30 consecutive days.

h. You may refuse to accept office hours and demand trial by court-martial. If you decline to accept office hours, the charges:

(1) May be dismissed;

(2) May be referred to trial by special court-martial;

(3) May be referred to trial by general court-martial;
or

(4) May be the basis for adverse administrative action.

3. You are further advised that if nonjudicial punishment is imposed under reference (c), you have the right to appeal to the Commanding General, III MEF, within five days after announcement of any punishment. The two bases for appeal are either that you consider the punishment unjust or that you consider the punishment to be disproportionate to the offenses for which imposed.

4. You must advise me in writing of your decision regarding your rights concerning nonjudicial punishment not later than five calendar days after receipt of this letter.

Copy to:
CO, [unit]

SAMPLE ACKNOWLEDGMENT OF NJP NOTIFICATION

1621

17

From: First Lieutenant John J. Jones 123 45 6789/1369 USMC

To: Commanding General, 1st Marine Aircraft Wing

Subj: NOTIFICATION OF OFFICE HOURS HEARING

Ref: (a) CG, 1stMAW ltr 1621 17 of

1. I acknowledge receipt of the reference which gave me notification of the intent to conduct office hours and I understand my rights in that regard.
2. I have received a copy of the information to support the allegations.
3. I have had an opportunity to consult with counsel. I (did/ did not) consult with counsel.
4. I (will/will not) accept office hours and (do/do not) demand trial by court-martial. At office hours, I (will/will not) plead guilty to the offenses alleged against me.
5. I (do/do not) request a personal appearance. Written matters (are/are not) attached.
6. I request that the following witnesses, if reasonably available, be present to testify at the hearing:

OFFICER NJP GUIDE

SNO: Reporting as ordered, sir.

CG: You may stand at ease.

SJA: This Office Hours hearing in the case of _____ is called to order at _____, 1991, before MajGen _____ the Commanding General of the 1st Marine Aircraft Wing.

SJA: _____ is suspected of committing the following violation(s) of the Uniform Code of Military Justice:

SJA: _____ has been advised in writing of his rights at this proceeding and has received a copy of all documents in support of the allegation(s) _____ has stated in writing that he had an opportunity to consult with counsel, that he understands his rights, and that he agrees to accept NJP.

CG: _____, do you have any questions at this time?

Are you prepared to proceed?

SNO: _____

CG: Do you plead guilty or do you wish to contest the allegations?

SNO: _____

CG: [I will accept your pleas of guilty). I will consider the statements and other documents contained in the preliminary inquiry, the documents provided by you, and your OQR.

CG: You may now present witnesses or additional evidence on your behalf.

SNO: [I would like to call _____

(NOTE: SJA will escort the witness into the hearing. The witness may speak to the CG in a narrative form and/or the witness may be questioned by the SNO and the CG)

CC: Do you have any more witnesses or any other evidence to present?

SNO: _____

CG: Do you desire to speak on your own behalf?

SNO: _____

[NOTE: CG may question the SNO. SNO also has the right to speak privately with the CG.).

CG: [Command Representative], do you have anything you would like to say regarding _____?

CG: [Defense Witness], do you have anything you would like to say regarding _____?

CG: _____, you are dismissed while I consider your case. The SJA will call you when I am ready to proceed.

[Closed for deliberation. When directed by the CG, the SJA will escort all parties back into the hearing.]

CG: I impose the following punishment:

[Note: CG awards one combined punishment for all offenses].

_____ No punishment

_____ Letter of Reprimand or Admonition

_____ Forfeiture of \$_____ per month for (1) or (2) mos.
[Not more than \$_____ per month for 2 months].

_____ Restriction to _____
(camp _____, quarters, place of duty, and worship) for _____
days.
[Limit of 60 days, cannot be combined with Arrest]

_____ Arrest in Quarters for _____ days.
[Limit of 30 days, cannot be combined with
restriction.]

_____ [(Punishment) to be suspended for
_____ months (not more than 6 months).]

CG: You may appeal this punishment to the Commanding General, III Marine Expeditionary Force. Do you understand that?

SNO: _____

CG: You are dismissed.

SAMPLE RECORD OF OFFICER NJP

LETTERHEAD

1621
17
Date

Subj: RECORD OF HEARING UNDER ARTICLE 15, UCMJ IN THE CASE
OF FIRST LIEUTENANT JOHN J. JONES 123 45 6789/1369 USMC

Ref: (a) Article 15, UCMJ
(b) Part V, MCM, 1984
(c) MCO P5800.8B (LEGADMINMAN)

Encl: (1) CG, 1stMAW ltr 1621 17 of 13 Nov 90
(2) [SNO's] ltr 1621 17 of 15 Nov 90
(3) Maj Smith's Report of Article 32 investigation of 10 Oct 90 w/encls

1. 1stLt Jones received nonjudicial punishment from MajGen Smith, Commanding General of the 1st Marine Aircraft Wing, on 4 Dec 90 for conduct unbecoming an officer. He was awarded a punitive letter of reprimand and forfeiture of \$500.00 pay per month for two months.

2. The NJP hearing was conducted in substantial compliance with references (a) and (b). As reflected in enclosures (1) and (2), 1stLt Jones was notified of his rights prior to the hearing and elected to accept nonjudicial punishment.

3. This report is prepared by the Staff Judge Advocate, who was present throughout the proceedings, per paragraph 4003 of reference (c).

4. During the hearing, 1stLt Jones acknowledged his rights and restated his election to accept NJP. He pled guilty to the charge. Details of the allegations are contained in the Article 32 investigation report, attached as enclosure (3).

5. Prior to imposing punishment, the Commanding General deliberated and specifically stated that he considered enclosure (3) including the numerous statements of good character, the Officer Qualification Record, and the oral statements of the witness, 1stLt Jones, and the command representative. After the punishment was announced, the Commanding General advised 1stLt Jones of his right to appeal to the Commanding General, III Marine Expeditionary Force.

6. At the hearing, 1stLt Jones and a character witness, Major Johnson, made statements substantially as follows:

a. 1stLt Jones: Sir, every day, for the last four months, I have regretted this incident. I believe that alcohol affected my judgement that night. It was totally out of character for me. It will never happen again. My statement at the Article 32 hearing was to the best of my recollection. I am responsible for my actions and I am willing to face the consequences. I would love to be able to stay a Marine.

b. Major Johnson, Executive Officer, [unit]. I am 1stLt Jones' Executive Officer, but I have known him since August of 1989 when we were both students in the aviation supply school at Athens, Georgia. He did well at school and was well-respected. I believe he just exercised bad judgment on the night in question. It was an isolated incident. While I was at the Basic School, I filled several billets and observed many lieutenants. In my opinion, Lt Jones rates at the top of the batch. I would not hesitate to have him continue to serve with me.

7. The command representative, Col Brown, USMC, Commanding Officer, [unit], made a statement substantially as follows: After reviewing all the facts in this incident, I do not have confidence in Lt Jones' judgment or integrity. While the overall incident may have been isolated, he made several separate judgment errors that evening. Lt Jones does not have the integrity required of Marine Corps officers.

Record Authenticated by:

C. L. VARREC
Lieutenant Colonel, USMC
Staff Judge Advocate

SAMPLE OFFICER NJP REPORT

LETTERHEAD

1621

17

[Date]

FOR OFFICIAL USE ONLY

From: Commanding General, 1st Marine Aircraft Wing
To: Commandant of the Marine Corps (JAM)
Via: (1) Commanding General, III Marine Expeditionary Force
(2) Commanding General, Fleet Marine Force Pacific

Subj: REPORT OF NONJUDICIAL PUNISHMENT IN THE CASE OF FIRST
LIEUTENANT JOHN J. JONES 123 45 6789/1369 USMC

Ref: (a) MCO P5800.8B (LEGADMINMAN)
(b) FMFPacO 5810.1L
(c) Art. 15, UCMJ
(d) Part V, MCM, 1984
(e) Chpt. 1, Part B, JAG Manual
(f) Article 1122, U.S. Navy Regulations, (1990)

Encl: (1) Record of Hearing under Article 15, UCMJ
(2) Punitive Letter of Reprimand
(3) 1stLt Jones' ltr 1621 17 of [date]
(4) 1stLt Jones' statement regarding adverse matter

1. This report is forwarded for inclusion on 1stLt Jones' official records per paragraph 4003 of reference (a) via intermediate commanders, as directed by paragraph 3d(2) of reference (b).

2. On 4 December 1990, in accordance with references (c), (d), and (e), nonjudicial punishment was imposed on 1stLt Jones for conduct unbecoming an officer. As a result, he was awarded a punitive letter of reprimand and a forfeiture of \$400.00 pay per month for two months.

3. Details of the hearing and the circumstances of the offenses are set forth in enclosure (1). A copy of the punitive letter of reprimand is attached as enclosure (2).

4. As reflected in enclosure (3), 1stLt Jones did not appeal the punishment. Accordingly, the NJP is now final and will be reflected in the fitness report that includes the date it was imposed, 4 December 1990.

5. I recommend that 1stLt Jones be retained on active duty until the expiration of his obligated active service.

6. By copy hereof, 1stLt Jones is notified of his right, per reference (f), to submit his comments, within 15 days of receipt, concerning this report of nonjudicial punishment and the letter of reprimand which will be included as adverse matter in his official records. His comments, if any, will be attached as enclosure (4).

Copy to:
CO, MAG-32
CO, MALS-32
1stLt Jones

SAMPLE FIRST ENDORSEMENT

LETTERHEAD

FIRST ENDORSEMENT on CG, 1stMAw ltr 1621 17 of 26 Feb 91

From: Commanding Officer, Marine Wing Aircraft Squadron 1

To: First Lieutenant John J. Jones 123 45 6789/1369 USMC

Subj: PUNITIVE LETTER OF REPRIMAND

1. Delivered.

By direction

SAMPLE PUNITIVE LETTER OF REPRIMAND**LETTERHEAD**

1621

17

Date

From: Commanding General, 1st Marine Aircraft Wing
To: First Lieutenant John J. Jones 123 45 6789/1369 USMC
Via: Commanding Officer, Marine Wing Headquarters Squadron 1

Subj: PUNITIVE LETTER OF REPRIMAND

Ref: (a) UCMJ, Art 15
(b) Part V, MCM, 1984
(c) JAG Manual, 0114
(d) Record of Office Hours proceeding

1. On [date], you received nonjudicial punishment per references (a), (b), and (c). Prior to the hearing, you were advised of your right to demand trial by court-martial and you elected not to do so. Reference (d) is a summary of the hearing.
2. During July 19CY, you were involved in two separate alcohol related incidents that resulted in this letter. You were drunk and disorderly on both occasions. On 15 July 19CY, you hosted a party in your BOQ room in Plaza housing, Okinawa, Japan. At about 0300, a female military policeman asked you to turn down your stereo. In response, you called her a "bitch," told her to "go to hell," threatened her with your fists, and threatened another corporal. At about 0300, 16 July 19CY, you were found asleep in your car near a gangster residence in Okinawa City, Okinawa, Japan. Upon being awakened by Japanese Police and asked to leave the area, you got out of your car and became violent, scuffling with the police and Air Force Security Police who were called to the scene, resulting in your being handcuffed and led away.
3. Your misconduct as an officer in dealing with enlisted military police and with Japanese law enforcement personnel brought discredit upon the officer corps. Your conduct reflects adversely on the leadership, judgment, and discipline required of you as an officer of Marines. Accordingly, pursuant to references (a), (b), and (c), you are reprimanded.
4. You are hereby advised of your right to appeal this action within five days of receiving this letter to the next superior authority, the Commanding General, III Marine Expeditionary Force, via the Commanding General, 1st Marine Aircraft Wing, per references (a), (b), and (c).

5. If you do not desire to appeal this action, you are directed to so inform me in writing within five days after receipt of this letter.
6. If you do desire to appeal this action, you are advised that an appeal must be made within a reasonable time and that, in the absence of unusual circumstances, an appeal made more than five days after receipt of this letter may be considered as not having been made within a reasonable time. If, in your opinion, unusual circumstances exist which make it impractical or extremely difficult for you to prepare and submit your appeal within the five days, you shall immediately advise me of such circumstances and request an appropriate extension of time to submit your appeal. Failure to receive a reply to such request will not, however, constitute a grant of such extension of time to submit your appeal. In all communications concerning an appeal of this letter, you are directed to state the date of your receipt of this letter.
7. Unless withdrawn, or set aside by higher authority, a copy of this letter will be placed in your official record at Headquarters, U.S. Marine Corps. You may forward within 15 days after receipt of final denial of your appeal or after the date of notification of your decision not to appeal, whichever may be applicable, a statement concerning this letter for inclusion in your record. If you do not desire to submit a statement, you shall so state, in writing, within 5 days. You are advised that the statement submitted shall be couched in temperate language and shall be confined to the pertinent facts. Opinions shall not be expressed nor the motives of others impugned. Your statement may not contain countercharges.
8. Your reporting senior must note this letter in the next fitness report submitted after this letter becomes final, either by decision of higher authority upon appeal, or by your decision not to appeal.
9. A copy of reference (d) has been provided to you for your use in deciding whether to appeal the issuance of this letter.

· G. LEVY

SAMPLE ADVERSE MATTER STATEMENT

From: First Lieutenant John J. Jones 123 45 6789/1369 USMC

To: Commanding General, 1st Marine Aircraft Wing

Subj: STATEMENT REGARDING ADVERSE MATTER IN OFFICIAL RECORDS

Ref: (a) CG 1stMAW ltr 1621 17 of

(b) Art. 1122, U. S. Navy Regulations (1990)

1. I received a copy of reference (a) on [date].
 2. I understand my right per reference (b), to make a statement concerning the report of nonjudicial punishment, with enclosures, including the punitive letter of reprimand.
 3. I choose to make (no statement) (the following statement).
-

SAMPLE OFFICER NJP APPEAL

From: First Lieutenant John J. Jones 123 45 6789/1369 USMC

To: Commanding General, III Marine Expeditionary Force

Via: (1) Commanding General, 1st Marine Aircraft Wing

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

Ref: (a) CG, 1stMAW Ltr of Reprimand 1620 17 of 26 Jul 90

(b) Record of Hearing

(c) Article 15, UCMJ

(d) Part V, MCM, 1984

1. I acknowledge receipt of references (a) and (b) on [date].
 2. I further acknowledge that I understand my rights under references (c) and (d) to appeal the imposition of nonjudicial punishment, including the punitive letter of reprimand, to the Commanding General, III Marine Expeditionary Force.
 3. I desire to appeal on the ground that the punishment was (unjust, disproportionate to the offenses committed) as follows:
-

SUMMARY COURTS-MARTIAL

5206 CHECKLIST

A. Pretrial Procedures

1. Check the service record out from personnel or PSD.
2. Prepare the DD Form 458 and the convening order for the CO's signature.
3. You will need 3 copies of the charge sheet and 4 copies of the convening order. Distribute as follows: one of each for the accused, one of each for the SCM officer, one of each for command files. The fourth convening order should be certified as a true copy and attached to the original charge sheet. The original is retained in the command files for future use.
4. Inform the accused of his rights at the SCM, his right to refuse SCM, and his right to consult with counsel.
5. If accused consults with an attorney, be sure he has made an election to accept a SCM. If accused has elected a SCM and desires to waive counsel at the court, have the accused sign a Waiver of Rights to Counsel form. This allows the results to be admissible as a conviction at a later court-martial for purposes of the escalator clause.
6. Obtain a list of witnesses desired by accused and arrange for their attendance at the trial.
7. Inform the member's division officer that the accused could receive confinement and that a full sea bag is required. This will save time after trial if confinement is in fact adjudged.
8. Contact SCM officer and inform him generally of duties. Ensure the SCM officer has a copy of the SCM trial guide in Appendix 9 to the MCM, 1984, and Record of Trial by SCM form, DD Form 2329.

B. Post-Trial Procedures

1. If confinement has been awarded, prepare the confinement orders and alert personnel that TEMADD orders will be needed.
2. If member is to be confined, copy pages 2, 4, 5, 9, 10, and any pages 6, 7, and 13 relating to prior NJP's. Also copy any evaluations or commendations. This information may be needed to prepare the convening authority's action and the service record is sent to the brig with the prisoner.
3. Ensure that the SCM officer had completed blocks 1-11 of the Record of Trial by Summary Court-Martial (DD Form 2329) and signed block 12.
4. Notify the accused of the right to submit matters to the convening authority (CA) for consideration in taking the action on the record. The accused has seven days from the date sentence is announced to submit any matters to the CA. The accused may waive his right to submit matters to the CA. If this is done, the waiver MUST be in writing and should be attached to the record of trial.
5. After the seven days have elapsed, consult with your commanding officer to determine what action is to be taken on the record of trial; then prepare the CA's action accordingly. This is done by completing block 13 of the Record of Trial by Summary Court-Martial. If the accused has waived the right to submit matters, the CA need not wait seven days prior to taking the action on the record. Although not statutorily required, it is recommended that this waiver be noted in the CA's action.
6. Assemble the record of trial. The ROT should include a certified copy of the convening order, the original charge sheet, copies of any documentary evidence used, any summarizations of witness testimony (if any -- this is no longer required by the MCM, 1984, but may be desired or required by the SCM procedures established by the GCMA in your chain of command), and the Record of Trial by Summary Court-Martial (DD Form 2329). (Check also chain of command directives for local requirements for content of the record of trial.)
7. Complete the processing times report and attach it to the record of trial. [See OPNAVINST 5810.4 and JAGINST 5810.1, encl (6).]

8. Make three copies of this package and distribute as follows: one to the accused; one to the accused's service record; and one for the command's files.
9. Forward the original to the appropriate judge advocate for review (this is probably either your area coordinator or the GCMA).
10. Ensure that appropriate service record page entries are prepared to record the CA's action. This should include a page 7 (if there is confinement, a reduction, or a forfeiture) and other entries on page 4 and 9 as needed.
11. Upon completion of any adjudged confinement, ensure that a page 7 is prepared to indicate the release and appropriate lost time.

SAMPLE SCM CONVENING ORDER

DEPARTMENT OF THE NAVY
USS OLDSHIP (DD 111)
FPO New York 09501-5555

27 Oct CY

SUMMARY COURT-MARTIAL CONVENING ORDER 9-CY

Pursuant to authority contained in paragraph 0115a(3), Judge Advocate General of the Navy Instruction 5800.7B, of 7 July 1978, Lieutenant Brand S. New, U.S. Navy, is detailed a summary court-martial.

HANG M. HIGH
Commander, U.S. Navy
Commanding Officer
USS OLDSHIP (DD 111)

DOCUMENTING COMPLIANCE WITH "BOOKER" AT SCM (SRB Page 13/12)

[Date of SCM]: SNM CONSULTED WITH INDEPENDENT MILITARY COUNSEL PRIOR TO DECIDING WHETHER TO ACCEPT OR REFUSE THE SUMMARY COURT-MARTIAL HELD ON THIS DATE. SNM ACCEPTED TRIAL BY SUMMARY COURT-MARTIAL

NAME
RANK, SERVICE
POSITION
BY DIRECTION

SUMMARY COURT-MARTIAL
ACKNOWLEDGEMENT OF RIGHTS AND WAIVER

I, (Rate, Name, Branch of Service) assigned to (Accused's command or unit) acknowledge the following facts and rights regarding summary courts-martial:

1. I have the right to consult with a lawyer prior to deciding whether to accept or refuse trial by summary court-martial. Should I desire to consult with counsel, I understand that a military lawyer may be made available to advise me, free of charge, or, in the alternative, I may consult with a civilian lawyer at my own expense.

2. I realize that I may refuse trial by summary court-martial, in which event the commanding officer may refer the charge(s) to a special court-martial. My rights at a summary court-martial would include:

a. The right to confront and cross-examine all witnesses against me.

b. The right to plead not guilty and the right to remain silent, thus placing upon the government the burden of proving my guilt beyond a reasonable doubt.

c. The right to have the summary court-martial call, or subpoena, witnesses to testify in my behalf.

d. The right, if found guilty, to present matters which may mitigate the offense or demonstrate extenuating circumstances as to why I committed the offense.

e. The right to be represented at trial by a civilian lawyer provided by me at my own expense, if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it.

3. I understand that the maximum punishment which may be imposed upon me at a summary court-martial is:

On E-4 and below

Confinement for one month; or
Hard labor without confinement
for 45 days; or 60 days
restriction; AND

On E-5 and above

60 days restriction; AND

Forfeiture of 2/3 pay
month; AND

Forfeiture of 2/3 pay for for one
one month; AND

Reduction to the lowest
enlisted paygrade (E-1).

Reduction to the next
inferior paygrade.

4. Should I refuse trial by summary court-martial, the commanding officer may refer the charge(s) to trial by special court-martial. At a special court-martial, in addition to those rights set forth above with respect to a summary court-martial, I would also have the following rights:

a. The right to be represented at trial by a military lawyer, free of charge, including a military lawyer of my own selection if the one I select is reasonably available. I would also have the right to be represented by a civilian lawyer at no expense to the United States.

b. The right to be tried by a special court-martial composed of at least three officers as members or, at my request, at least one-third of the court members would be enlisted personnel. If tried by a court-martial with members, two-thirds of the members, voting by secret written ballot, would have to agree in any finding of guilty, and two-thirds of the members would also have to agree on any sentence to be imposed should I be found guilty.

c. The right to request trial by a military judge alone. If tried by a military judge alone, the military judge alone would determine my guilt or innocence and, if found guilty, the judge alone would determine an appropriate sentence in my case.

5. I understand that the maximum punishment which can be imposed at a special court-martial for the offense(s) presently charged against me is:

Discharge from the naval service with a bad-conduct
discharge [delete if inappropriate]; Confinement for _____
months;

Forfeiture of 2/3 pay per month for _____ months; and

Reduction to the lowest enlisted pay grade (E-1).

Knowing and understanding my rights as set forth above, I (do) (do not) desire to consult with counsel before deciding whether to accept trial by summary court-martial.

Knowing and understanding my rights as set forth above (and having first consulted with counsel), I hereby (consent) (object) to trial by summary court-martial.

Signature of accused and date

Signature of witness and date

ADDENDA TO SUMMARY COURT-MARTIAL TRIAL GUIDE
(MCM, 1984, App. 9)

HANDLING CONFESSIONS AT SUMMARY COURT-MARTIAL

NOTE: Before you consider an out-of-court statement of the accused as evidence against him, you must be convinced by a preponderance of the evidence that the statement was made voluntarily and that, if required, the accused was properly advised of his rights. Mil.R.Evid. 304, 305.

A confession or admission is not voluntary if it was obtained through the use of coercion, unlawful influence, or unlawful inducement, including obtaining the statement by questioning an accused without complying with the warning requirements of Article 31(b), UCMJ, and without first advising the accused of his rights to counsel during a custodial interrogation. You must also keep in mind that an accused cannot be convicted on the basis of his out-of-court self-incriminating statement alone, even if it was voluntary, for such a statement must be corroborated if it is to be used as a basis for conviction. Mil.R.Evid. 304(g).

If a statement was obtained from the accused during a custodial interrogation, it must appear affirmatively on the record that the accused was warned of the nature of the offense of which he was accused or suspected, that he had the right to remain silent, that any statement he made could be used against him, that he had the right to consult lawyer counsel and have lawyer counsel with him during the interrogation, and that lawyer counsel could be civilian counsel provided by him at his own expense or free military counsel appointed for him.

After the above explanation, the accused or suspect should have been asked if he desired counsel. If he answered affirmatively, the record must show that the interrogation ceased until counsel was obtained. If he answered negatively, he should have been asked if he desired to make a statement. If he answered negatively, the record must show that the interrogation ceased. If he affirmatively indicated that he desired to make a statement, the statement is admissible against him. The record must show, however, that the accused did not invoke any of these rights at any stage of the interrogation. In all cases in which you are considering the reception in evidence of a self-incriminating statement of the accused, you should call the person who obtained the statement to testify as a witness and question him substantially as follows:

SCM: (After the routine introductory questions) Did you have occasion to speak to the accused on _____?

WIT: (Yes) (No) _____.

SCM: Where did this conversation take place and at what time did it begin?

WIT: _____.

SCM: Who else, if anyone, was present?

WIT: _____.

SCM: What time did the conversation end?

WIT: _____.

SCM: Was the accused permitted to smoke as he desired during the period of time involved in the conversation?

WIT: _____.

SCM: Was the accused permitted to drink water as he desired during the conversation?

WIT: _____.

SCM: Was the accused permitted to eat meals at the normal meal times as he desired during the conversation?

WIT: _____.

SCM: Prior to the accused making a statement what, if anything, did you advise him concerning the offense of which he was suspected?

WIT: (I advised him that I suspected him of the theft of Seaman Jones' Bulova wristwatch from Jones' locker in Building 15 on 21 January 1984.)

SCM: What, if anything, did you advise the accused concerning his right to remain silent

WIT: (I informed the accused that he need not make any statement and that he had the right to remain silent.)

SCM: What, if anything, did you advise the accused of the use that could be made of a statement if he made one?

WIT: (I advised the accused that, if he elected to make a statement, it could be used as evidence against him at a court-martial or other proceeding.)

SCM: Did you ask the accused if he desired to consult with a lawyer or to have a lawyer present?

WIT: (Yes.) (No.)

SCM: (If answer to previous question was affirmative) What was his reply?

WIT: (He stated he did (not) wish to consult with a lawyer (or to have a lawyer present).)

NOTE: If the interrogator was aware that the accused had retained or appointed counsel in connection with the charge(s), then such counsel was required to be given notice of the time and place of the interrogation.

SCM: To your knowledge, did the accused have counsel in connection with the charge(s)?

WIT: (Yes.) (No.)

SCM: (If answer to previous question was affirmative) Did you notify the accused's counsel of the time and place of your interview with the accused?

WIT: (Yes.) (No.)

SCM: What, if anything, did you advise the accused of his rights concerning counsel?

WIT: (I advised the accused that he had the right to consult with a lawyer counsel and have that lawyer present at the interrogation. I also informed him that he could retain a civilian lawyer at his own expense and additionally a military lawyer would be provided for him. I further advised him that any detailed military lawyer, if the accused desired such counsel, would be provided at no expense to him.)

SCM: Did you provide all of this advice prior to the accused making any statement to you?

WIT: (Yes.)

- SCM: What, if anything, did the accused say or do to indicate that he understood your advice?
- WIT: (After advising him of each of his rights, I asked him if he understood what I had told him and he said he did. (Also, I had him read a printed form containing a statement of these rights and sign the statement acknowledging his understanding of these rights.))
- SCM: (If accused has signed a statement of his rights) I show you Prosecution Exhibit #2 for identification, which purports to be a form containing advice of a suspect's rights and ask if you can identify it?
- WIT: (Yes. This is the form executed by the accused on _____19____. I recognize it because my signature appears on the bottom as a witness, and I recognize the accused's signature, which was placed on the document in my presence.)
- SCM: Did the accused subsequently make a statement?
- WIT: (Yes.)
- SCM: Was the statement reduced to writing?
- WIT: (Yes.) (No.)
- SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, threaten the accused in any way?
- WIT: (Yes.) (No.)
- SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, make any promises of reward, favor, or advantage to the accused in return for his statement?
- WIT: (Yes.) (No.)
- SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, strike or otherwise offer violence to the accused should he not make a statement?
- WIT: (Yes.) (No.)
- SCM: (If the accused's statement was reduced to writing) Describe in detail the procedure used to reduce the statement in writing.

WIT: _____

SCM: Did the accused at any time during the interrogation request to exercise any of his rights?

WIT: (Yes.) (No.)

NOTE: If the witness indicates that the accused did invoke any of his rights at any stage of the interrogation, it must be shown that the interrogation ceased at that time and was not continued until such time as there had been compliance with the request of the accused concerning the rights invoked. If the witness testifies that he obtained a written statement from the accused, he should be asked if and how he can identify it as a written statement of the accused. When a number of persons have participated in obtaining a statement, you may find it necessary to call several or all of them as witnesses in order to inquire adequately into the circumstances under which the statement was taken.

SCM: I now show you Prosecution Exhibit 3 for identification, which purports to be a statement of the accused, and ask if you can identify it?

WIT: (Yes. I recognize my signature and handwriting on the witness blank at the bottom of the page. I also recognize the accused's signature on the page.)

SCM: (To accused, after permitting him to examine the statement when it is in writing) The Uniform Code of Military Justice provides that no person subject to the Code may compel you to incriminate yourself or answer any question which may tend to incriminate you. In this regard, no person subject to the Code may interrogate or request any statement from you if you are accused or suspected of an offense without first informing you of the nature of the offense of which you are suspected and advising you that you need not make any statement regarding the offense of which you are accused or suspected; that any statement you do make may be used as evidence against you in a trial by court-martial; that you have the right to consult with lawyer counsel and have lawyer counsel with you during the interrogation; and that lawyer counsel can be civilian counsel provided by you or military counsel appointed for you at no expense to you. Finally, any statement obtained from you through the use of coercion, unlawful influence, or unlawful inducement, may not be used in evidence against you in a trial by court-martial. In addition, any statement

made by you that was actually the result of any promise of reward or advantage, or that was made by you after you had invoked any of your rights at any time during the interrogation, and your request to exercise those rights was denied, is inadmissible and cannot be used against you. Before I consider receiving this statement in evidence, you have the right at this time to introduce any evidence you desire concerning the circumstances under which the statement was obtained or concerning whether the statement was in fact made by you. You also have the right to take the stand at this time as a witness for the limited purpose of testifying as to these matters. If you do that, whatever you say will be considered and weighed as evidence by me just as is the testimony of other witnesses on this subject. I will have the right to question you upon your testimony, but if you limit your testimony to the circumstances surrounding the taking of the statement or as to whether the statement was in fact made by you, I may not question you on the subject of your guilt or innocence, nor may I ask you whether the statement is true or false. In other words, you can only be questioned upon the issues concerning which you testify and upon your worthiness of belief, but not upon anything else. On the other hand, you need not take the witness stand at all. You have a perfect right to remain silent, and the fact that you do not take the stand yourself will not be considered as an admission by you that the statement was made by you under circumstances which would make it admissible or that it was in fact made by you. You also have the right to cross-examine this witness concerning his testimony, just as you have that right with other witnesses, or, if you prefer, I will cross-examine him for you along any line of inquiry you indicate. Do you understand your rights?

ACC: _____.

SCM: Do you wish to cross-examine this witness?

ACC: _____.

SCM: Do you wish to introduce any evidence concerning the taking of the statement or concerning whether you in fact made the statement?

ACC: _____.

SCM: Do you wish to testify yourself concerning these matters?

ACC: _____.

SCM: Do you have any objection to my receiving Prosecution Exhibits 2 and 3 for identification into evidence?

ACC: (Yes, sir (stating reasons).) (No, sir.)

SCM: (Your objection is sustained.)

--
(Your objection is overruled. These documents are admitted into evidence as Prosecution Exhibits 2 and 3.)

--
(There being no objection, these documents are admitted into evidence as Prosecution Exhibits 2 and 3.)

NOTE: If the accused's statement was given orally, rather than in writing, anyone who heard the statement may testify as to its content, if all requirements for admissibility have been met.

HANDLING UA GUILTY PLEA AT SCM**SUMMARY COURT-MARTIAL OFFICER INQUIRY
INTO THE FACTUAL BASIS OF A PLEA OF GUILTY
TO THE OFFENSE OF UNAUTHORIZED ABSENCE**

1. Assumption. Assume the accused has entered pleas of guilty to the following charge and specification:

Charge: Violation of the Uniform Code of Military Justice, Article 86

Specification: In that Seaman Virgil A. Tweedy, U.S. Navy, on active duty, Naval Justice School, Newport, Rhode Island, did, on or about 5 July 19CY, without authority, absent himself from his unit, to wit: Naval Justice School, Newport, Rhode Island, and did remain so absent until on or about 23 July 19CY.

2. Procedure. The summary court-martial officer, after he has completed the inquiry indicated in the TRIAL GUIDE as to the elements of the offense, should question the accused substantially as follows:

SCM: State your full name and rank.

ACC: Virgil Armond Tweedy, Seaman.

SCM: Are you on active duty in the U.S. Navy?

ACC: Yes, sir.

SCM: Are you the same Seaman Virgil A. Tweedy who is named in the charge sheet?

ACC: Yes, sir.

SCM: Were you on active duty in the U.S. Navy on 5 July 19CY?

ACC: Yes, sir.

SCM: What was your unit on that date?

ACC: The Naval Justice School.

SCM: Is that located in Newport, Rhode Island?

ACC: Yes, sir.

SCM: Tell me in your own words what you did on 5 July that caused this charge to be brought against you.

ACC: I stayed at home.

SCM: Had you been at home on leave or liberty?

ACC: Yes, sir.

SCM: Which one was it?

ACC: I had liberty on the 4th of July.

SCM: When were you required to report back to the Naval Justice School?

ACC: At 0800 on the 5th of July.

SCM: And, did you fail to report on 5 July 19CY?

ACC: Yes, sir.

SCM: When did you return to military control?

ACC: On 23 July 19CY.

SCM: How did you return to military control on that date?

ACC: I took a bus to Newport and turned myself in to the duty officer at the Naval Justice School.

SCM: When you failed to report to the Naval Justice School on 5 July, did you feel you had permission from anyone to be absent from your unit?

ACC: No, sir.

SCM: Where were you during this period of absence?

ACC: I was at home, sir.

SCM: Where is your home?

ACC: In Blue Ridge, West Virginia.

SCM: Is that where you were for this entire period?

ACC: Yes, sir.

SCM: During this period, did you have any contact with military authorities? By "military authorities" I mean not only members of your unit, but anyone in the military.

ACC: No, sir.

SCM: During this period, did you go on board any military installations?

ACC: No, sir.

SCM: Were you sick or hurt or in jail, or was there anything which made it physically impossible for you to return?

ACC: No, sir.

SCM: Could you have reported to the Naval Justice School on 5 July 19CY if you had wanted to?

ACC: Yes, sir.

SCM: During this entire period, did you believe you were an unauthorized absentee from the Naval Justice School?

ACC: Yes, sir; I knew I was UA.

SCM: Do you know of any reason why you are not guilty of this offense?

ACC: No, sir.

SUMMARY COURT-MARTIAL PUNISHMENT CHART

PERMISSIBLE PUNISHMENTS	E-4 and Below	E-5 and Above
Confinement	30 DAYS	NO
Bread & Water Diminished Rations	3 DAYS FOR SHIP- BOARD E-1 TO E-3	NO
Restriction	60 DAYS	60 DAYS
Hard Labor w/o confinement	45 DAYS	NO
Forfeiture of 2/3 Pay Per Month	30 DAYS; PAYMENT MAY BE EXTENDED OVER 90 DAYS PER JAGMAN 0019b	
Fine	YES BUT FINE AND FORFEITURE TOTAL MAY NOT EXCEED MAX FORFEITURE CEILING	
Reduction to next Inferior Pay Grade	YES	YES
Reduction to Lowest Pay Grade	YES	NO
Reprimand	YES	YES

CHAPTER 53

PRETRIAL MATTERS

PRETRIAL RESTRAINT

5301 **PREPARATION OF PRETRIAL CONFINEMENT ORDERS.** Most brig have their own instructions regarding any local requirements such as minimum sea bag needs, visiting hours, and release times. Obtain a copy of the local instruction for further guidance. See also the Navy Corrections Manual, SECNAVINST 1640.9 (series) and OPNAVINST 1640.6 (series) for all brig procedures.

A. Prepare a confinement order, NAVPERS 1640/4. You will normally need an original and three copies.

B. Check local requirements to determine whether to send dental, medical, and pay records to brig.

C. Have the accused's division officer assist the accused in obtaining the sea bag requirements for the brig.

D. Check local requirements to determine whether brig requires TEMADD orders. Do not use TEMDU orders for pretrial confinees.

E. Have member escorted to the medical department/emergency room for the confinement physical. Note: The doctor must sign the confinement order.

F. Upon confinement, the accused must be informed of the nature of the offenses for which he/she is being held. This should be acknowledged by the accused on the confinement order. The accused must also be informed of: (1) The right to remain silent; (2) any statement made may be used against him/her; (3) the right to retain civilian counsel at no expense to the United States and the right to request assignment of military counsel; and (4) the procedures by which pretrial confinement will be reviewed. This may be done by brig personnel or the person escorting the member to the brig. Check with the brig to see which method is preferred.

G. After the member is confined, the CO must, within 72 hours, determine that contained confinement of the accused is warranted. He must also forward a pretrial confinement memo to the initial review officer (IRO) by the seventh day of confinement, but should do so as soon as possible. (See R.C.M. 305.)

H. The command should be prepared to send a knowledgeable representative to the hearing held by the IRO. This representative should be cognizant of: (1) The circumstances regarding the charges; (2) the accused's past history for reliability; and (3) unauthorized absences.

I. After the hearing by the IRO, the command will receive a memo either allowing the confinement to continue or ordering the accused's release. If the member is ordered released, the command must comply. A lesser form of restraint may be imposed, but reconfinement may not occur without further misconduct or new evidence which would impact on the accused's reliability. (See R.C.M. 305.)

J. If pretrial confinement is to exceed 30 days, permission for continued confinement must be obtained from the cognizant GCM authority. Ensure that permission is received prior to the expiration of the 30th day, and request must be reviewed every 30 days.

NOTIFICATION OF PRETRIAL CONFINEMENT AND ITS REVIEW PROCESS

Date: 2 Jan CY

1. You have been placed in pretrial confinement pending trial by court-martial. As required by Rule 305(e) of the Manual for Courts-Martial, the following information is provided concerning this confinement and the procedures by which it will be reviewed.

- a. The nature of the offense(s) for which you are being confined are:

Violation of UCMJ, Article 86: Unauthorized absence from
USS PUGET SOUND (AD 38), from 23 October 19CY(-1)
until apprehended on 2 January 19CY.

- b. You have the right to:

(1) Remain silent, and any statement made by you may be used against you at a court-martial or other disciplinary or administrative proceeding.

(2) Retain a civilian lawyer, at no expense to the government.

(3) Request assignment of a military lawyer, at no cost to you, for the limited purpose of representing you only during the pretrial confinement proceedings before charges are referred.

c. Within 72 hours of your initial confinement, if ordered by your command, or 72 hours after your command is notified of your confinement (if a command other than your command confined you), your command must review your case to decide if pretrial confinement will continue.

d. If your command releases you from pretrial confinement, no further action on your pretrial confinement will be taken.

e. If your command concludes that continued pretrial confinement is necessary, your command must prepare a written memorandum stating the reasons for the following conclusions:

(1) That an offense triable by court-martial was committed;

(2) that you committed it;

(3) that confinement is necessary because it is foreseeable that you:

(a) Will not appear at trial, pretrial hearing, or investigation; or

(b) will engage in serious criminal misconduct; and

(4) that less severe forms of restraint are inadequate.

f. The memorandum prepared by your command will be forwarded to a reviewing officer, who must review your case within 7 days of imposition of confinement. After this review, the reviewing officer will decide if your pretrial confinement will, or will not, continue.

g. You and your lawyer, military and/or civilian (if you have either or both), shall be allowed to appear before the reviewing officer, if practicable, and make a statement and submit any matters you wish to be considered by the reviewing officer.

h. The requirements for confinement as set forth in subparagraph 1.e., above, must be proved by a preponderance of the evidence.

i. The reviewing officer may, for good cause, extend the time limit for completion of the initial review to 10 days after the imposition of pretrial confinement.

j. Upon completion of review, the reviewing officer shall approve continued confinement or order immediate release.

2. After completion of this review, the reviewing officer's conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum. A copy of the memorandum and all other documents considered by the reviewing officer shall be maintained in your case until completion of appellate review, and provided to you or the government on request.

3. The reviewing officer shall, after notice to the parties, reconsider the decision to confine you, if you so request such reconsideration. This reconsideration shall be based upon any significant information not previously considered. In addition, once the charges for which you have been confined are referred to trial, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief.

I. O. EWE
Lieutenant, U.S. Navy
Legal Officer

ACKNOWLEDGEMENT

Knowing and understanding the pretrial confinement review process and my rights as set forth above, I, David L. Typist, hereby:

1. Lawyer Assignment: (Initial one)

- () Request assignment of a military lawyer for the limited purpose of representing me during the pretrial confinement proceeding only.
- () Do not request assignment of a military lawyer for the limited purpose of representing me during the pretrial confinement proceeding only.

2. Personal Appearance: (Initial one)

- () Request to personally appear before the reviewing officer who will review my pretrial confinement.
- () Do not request to personally appear before the reviewing officer who will review my pretrial confinement.

(Confinee's signature)

(Date)

Witnessed by:

(Witness' signature) (Date)

I. O. EWE, LT, USN
Legal Officer, USS PUGET SOUND (AD 38)

DEPARTMENT OF THE NAVY
USS PUGET SOUND (AD 38)
FPO New York 09501

1640
Ser OO/
3 Jan CY

From: Commanding Officer, USS PUGET SOUND (AD 38)
To: Initial Review Officer, Naval Station, Rota, Spain

Subj: PRETRIAL CONFINEMENT ICO YN3 DAVID L. TYPIST, USN,
222-22-2222

Ref: (a) R.C.M. 305, MCM, 1984
(b) SECNAVINST 1640.10

1. Per references (a) and (b), the following information is provided for the purpose of conducting a hearing into the pretrial confinement of YN3 David L. Typist, USN, 222-22-2222.

a. Hour, date, and place of pretrial confinement:

1400, 2 January 19CY, Navy Brig, Naval Station, Rota

b. Offenses charged:

Violation of UCMJ, Article 86 -- Unauthorized absence from USS PUGET SOUND (AD 38) from 23 October 19CY(-1) until apprehended on 2-January 19CY.

c. General circumstances:

(1) Petty Officer Typist's absence began over liberty which expired on board at 0700, 23 October 19CY(-1). The circumstances, as related by Petty Officer Typist to his division officer, are that YN3 Typist was dissatisfied working in the admin office, did not like his immediate supervisor, and felt "picked on." He also relates that, at the time of his absence, he was working "undercover" with the Naval Investigative Service and the ship's master-at-arms force in identifying drug abusers on board the Naval Station. He states that a fellow petty officer (whom he identified as a drug user) found out that YN3 Typist was the one responsible for a "bust" in which this petty officer was involved. This unidentified petty officer had threatened YN3 Typist with bodily harm. Apparently becoming scared, Petty Officer Typist fled the area.

(2) These statements are unfounded. I have learned, through conversations with the Naval Investigative Service and my chief master-at-arms, that they have never used Petty Officer Typist in their programs, nor have they ever heard of YN3 Typist.

(3) Petty Officer Typist was apprehended by Shore Patrol at 1300, 2 January 19CY, at a local bar in Palma de Mallorca, Spain. I found it appropriate to place YN3 Typist in confinement due to the duration of the absence (approximately 72 days), and considering the absence was terminated by apprehension.

2. Previous disciplinary action:

a. CO's NJP, USS PUGET SOUND (AD 38) on 3 April 19CY(-1). Violation of UCMJ, Article 86 -- Unauthorized absence from appointed place of duty. Awarded: 10 days extra duties.

b. CO's NJP, USS PUGET SOUND (AD 38) on 10 June 19CY(-1). Violation of UCMJ, Article 86 -- Unauthorized absence from unit (approximately 3 days). Awarded: Forfeiture of \$100.00 pay per month for one month and 30 days restriction.

c. CO's NJP, USS PUGET SOUND (AD 38) on 12 July 19CY(-1). Violation of UCMJ, Article 86 (6 specifications) -- Failure to go to appointed place of duty, to wit: Restricted men's muster. Awarded: 30 days extra duties and forfeiture of \$100.00 pay per month for two months.

3. Extenuating or Mitigating Circumstances: None.

4. Due to the aforementioned information, continued pretrial confinement is appropriate in this case. YN3 Typist has a history of unauthorized absences, which indicates to me the solution to any of his problems is to absent himself without authority. YN3 Typist has shown that a lesser form of restraint would be inadequate as evidenced by paragraph 2.c. above (failure to go to restricted men's musters). Charges have been preferred for trial by special court-martial. No unusual delays are expected in this case. Given the nature of the offense charged and the sentence which could be imposed by court-martial for this offense, I am confident YN3 Typist would again flee to avoid prosecution.

ROBERT R. ROBERTS

From: Initial Review Officer, Naval Station, Rota, Spain
To: Commanding Officer, USS PUGET SOUND (AD 38)

Subj: PRETRIAL CONFINEMENT ICO YN3 DAVID L. TYPIST, USN,

Ref: (a) R.C.M. 305, MCM, 1984
(b) SECNAVINST 1640.10
(c) CO, USS PUGET SOUND (AD 38) ltr of 3 Jan CY

1. Per the provisions of references (a) and (b), I conducted a hearing concerning the pretrial confinement of YN3 Typist on 4 January 19CY. All information available at the time of the hearing, in addition to the comments and recommendations set forth in reference (c), have been reviewed.
2. At the hearing, YN3 Typist was afforded all rights set forth in reference (a). YN3 Typist was represented by Lieutenant P. T. Pertee, JAGC, USNR, Naval Legal Service Office Detachment, Rota Spain, who was detailed pursuant to the confinee's request for military counsel. Lieutenant I. O. Ewe, USN, legal officer, USS PUGET SOUND (AD 38) was present, acting in the capacity of command representative.
3. Having waived his right to remain silent, YN3 Typist was willing to discuss his absence with me. His reasons for going UA, as stated in reference (c), remain basically the same. YN3 Typist stands firm on his story concerning his involvement with the Naval Investigative Service. However, upon advisement of his counsel, YN3 Typist terminated the questioning. Lieutenant Ewe, command representative, had nothing further to offer except to reconfirm the command's position that continued confinement is warranted.
4. I find there is probable cause to believe the confinee committed the offense, and that court-martial jurisdiction does exist over the confinee and the offense charged. I find no cause to extend the time limit for completion of this review.
5. Subject to the foregoing, I find continued pretrial confinement appropriate in this case and that lesser forms of restraint would be inadequate to ensure the presence of YN3 Typist at trial. The confinee should be brought to trial as soon hereafter as practicable, barring any unforeseen delays.
6. Pursuant to paragraphs (i)(7) and (j) of reference (a), reconsideration of this decision may be appropriate at a later date.

I. C. LIGHT
Commander, U.S. Navy

SAMPLE RESTRICTION ORDERS

LETTERHEAD

From: Commanding Officer, Naval Air Station

To: (Rate, name, armed force, social security number)

Subj: RESTRICTION ORDERS

1. You are hereby placed on ____ days restriction as awarded you at a [____ court-martial][commanding officer's nonjudicial punishment] on _____, 19__.

2. You are hereby notified that the restriction limits and additional requirements are as follows:

a. You are required to remain within the perimeter and gates of the Naval Air Station, Wonderful, Florida.

b. You are not permitted in BEQ 999, 998, 997, or 996; Consolidated Package Store, Mini-Mart; bowling alley, Enlisted Mens' Club Complex, or Navy Exchange Cafeteria, or anywhere else on base that sells alcoholic beverages.

c. While you are on restriction, you may not operate a privately owned vehicle. If you have an automobile and desire to leave your automobile parked in the designated parking area, you must turn all of your ignition keys in to the chief master-at-arms who will provide you with a receipt. The chief master-at-arms will take custody of your keys, but not your automobile. You may arrange to have your automobile stored off the Naval Air Station at your own expense.

d. You are to be inside the Discipline Barracks between the hours of 1900 and 0600 daily.

e. You are hereby ordered to muster at the Discipline Barracks at the following times:

Workdays (including Saturday): 0615, 0745, 1130, 1245, 1600, 1800, 2000, 2145.

Non-workdays (Sundays and holidays): 0715, 1000, 1130, 1400, 1600, 1800, 2000, 2145.

NOTE: You are also required to come to any additional musters that may be prescribed by the duty desk chief. You will also be present for all bunk checks from taps to reveille.

f. You will surrender the following items to the master-at arms:

(1) Identification card (a Restriction ID card will be issued);

and

(2) all civilian clothes (an inventory will be made and you will be given a receipt for all clothing turned in).

g. You are required to be in the complete uniform of the day at all times between reveille and taps. You are not permitted to be in civilian clothes **AT ANY TIME.**

h. You are ordered to keep your face clean-shaven for the duration of your restriction.

i. You are required to march in formation to meals, if you desire to eat. The formation will depart for the meal from the muster area immediately preceding the meal. There is no requirement to march back from the meal.

j. You are to ensure that you are berthed in the proper bunk. Failure to do so will result in your being considered an unauthorized absentee.

k. If it is necessary for you to go to the Naval Hospital, Naval Air Station, Wonderful, Florida, you will be transported to and from the hospital by the master-at-arms force. You are forbidden to go or return on your own.

l. You are not to consume, or have in your possession, alcoholic beverages of any kind at any time.

3. You are hereby notified that all the above constitute lawful orders and that failure to comply is a violation of the Uniform Code of Military Justice and will subject you to disciplinary action.

By direction of the
Commanding Officer

I acknowledge this restriction order. I have read and understand its content.

(Signature of restricted person)

PRETRIAL AGREEMENTS

5302 **GENERAL.** The pretrial agreement (PTA) is an agreement between convening authority (CA) and the accused. Under R.C.M. 705, the accused may "plead guilty to, or enter a confessional stipulation as to one or more charges and specifications, and to fulfill such [permissible] additional terms or conditions which may be included in the agreement" Only the CA may bind the government. The CA may promise to do one or more of the following: refer the case to a certain type of court-martial; refer a capital offense as noncapital; withdraw any charges or specifications; have the trial counsel present no evidence as to one or more specifications or portions thereof; and take specified action on the sentence adjudged.

5303 **NEGOTIATION.** Under R.C.M. 705(d), the defense must initiate all PTA offers. Recent decisions have focused on whether particular provisions originated with the defense. See United States v. Jones, 23 M.J. 305, 308 (C.M.A. 1987)(Cox, J., concurring). Although change 5 to the Manual permits the Government to initiate plea negotiations, it remains a good practice to look at the defense cards before showing the government hand. Moreover, when controversial provisions originate with the defense, "an otherwise valid guilty plea will rarely, if ever, be invalidated" United States v. Gibson, 29 M.J. 379, 382 (C.M.A. 1990). A written defense offer also protects the government against a later claim of lack of jurisdiction. See United States v. Wilkins, 29 M.J. 421 (C.M.A. 1990)(defense plea to receiving stolen property valid, even though not an LIO of larceny, given that defense offered to plead to receiving stolen property in PTA approved by CA).

5304 **PERMISSIBLE TERMS AND CONDITIONS**

A. Testify Against Another. The accused may promise to testify as a witness in the trial of another person. United States v. Phillips, 24 M.J. 812 (A.F.C.M.R. 1987). The PTA should NOT specify the content of the testimony. United States v. Stoltz, 14 U.S.C.M.A. 461, 34 C.M.R. 241 (1964). Further, don't structure the benefits to ripen each time the accused testifies against another, a practice found "repugnant to civilized sensibilities" because it offered "an almost irresistible temptation to a confessedly guilty party to testify falsely to escape the adjudged consequences of his own misconduct." United States v. Scoles, 14 U.S.C.M.A. 14, 33 C.M.R. 226(1963); United States v. Conway, 20 U.S.C.M.A. 99, 42 C.M.R. 291 (1970). Use this wording in the PTA: "I agree to testify truthfully and fully [if called by the government][under a grant of testimonial immunity] as a witness in the trial of United States v. Seaman Apprentice Arnold Schwartz U.S. Navy."

B. Restitution. The accused may promise to provide restitution. Restitution under R.C.M. 705(c)(2)(C) is not limited to loss or damage directly attributable to the accused's crime. Restitution may cover any loss caused by misconduct related in any way to any offense charged, regardless of the accused's plea thereto. United States v. Olson, 25 M.J. 293, 296 (C.M.A. 1987). An agreement to make restitution should state the name of the recipient and an ability and willingness to pay a certain sum of money by a particular date. Sample PTA provision: "I agree to make restitution Colonel John Matrix USMC in the amount of \$192.00 by [1 July 1992][the date the convening authority takes action on my case]."

C. Procedural Waivers. The accused may promise to waive procedural requirements such as the Article 32 investigation. R.C.M. 705(c)(2)(E); United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982). See United States v. Hayes, 24 M.J. 786 (A.C.M.R. 1987)(Waiver of Article 34 advice). Sample PTA provision: "I agree to waive my right to an investigation pursuant to Article 32, Uniform Code of Military Justice."

D. Waiver of Particular Forum. The accused may waive the right to trial by court-martial composed of members or the right to request trial by military judge alone. R.C.M. 705(c)(2)(E). This provision must originate with the defense. See United States v. Zelenski, 24 M.J. 1 (C.M.A. 1987); United States v. Woodward, 24 M.J. 515 (A.F.C.M.R. 1987). The military judge should inquire to avoid the implication that the provision is a "standard" demand of the Government. United States v. Ralston, 24 M.J. 709 (A.C.M.R. 1987). Sample PTA provision: "I agree to request trial by military judge alone. This provision originated with me and my counsel."

E. Motions. Per R.C.M. 705(c)(1)(B), the accused may agree to waive motions based on evidentiary or constitutional grounds, so long as it truly originates with the defense. United States v. Jones, 23 M.J. 305 (C.M.A. 1987)(waiving search and seizure, out-of-court identification motions); United States v. Gibson, 29 M.J. 379 (C.M.A. 1990)(Waiver of hearsay and confrontation objections to pretrial statements made by accused's children); United States v. Corriere, 24 M.J. 701 (A.C.M.R. 1987)(unlawful command influence); United States v. Kitts, 23 M.J. 105, 108 (C.M.A. 1986)(close scrutiny to ensure waiver of unlawful command influence issue was not caused by the government's "tactical machinations."

F. Stipulations of Fact. The accused may promise to enter into a stipulation of fact concerning offenses to which a plea of guilty will be entered. The stipulation should be unequivocal that counsel and the accused agree not only to "the truth of the matters stipulated but that such matters are admissible in evidence against the accused to reflect the full agreement and understanding of

the parties. United States v. Glazier, 26 M.J. 268 (C.M.A. 1988). Consider the following:

The government and the defense, with the express consent of the accused, stipulate that the following facts are true, susceptible of proof, and admissible in evidence. These facts may be considered by the military judge, in determining the providence of the accused's pleas, and by the sentencing authority and on appeal, in determining an appropriate sentence, even if the evidence of such facts is deemed otherwise inadmissible. The accused expressly waives any objection to the admission of these facts into evidence at trial under the Military Rules of Evidence, U.S. Constitution, or applicable case law.

1. Iron out a signed stipulation of fact before sending the PTA to the CA to preserve the trial counsel's leverage in dictating the content of the stipulation. United States v. Vargas, 29 M.J. 968, 970, 971 (A.C.M.R. 1990)(stipulation carried added weight because it "was presented to the CA as part of the proposed plea agreement;" defense's later efforts to redact prejudicial portions were unsuccessful). Using the elements as a working framework, the stipulation should establish the factual basis for the offense, including a description of aggravating factors and any other admissible evidence the government could introduce on the merits.

2. The stipulation may include uncharged misconduct. Judges have no sua sponte duty to determine the admissibility of uncharged misconduct in a stipulation. United States v. Jackson, 30 M.J. 565 (A.C.M.R. 1990). The stipulation may also include facts relating to motive, impact on the victim, etc. United States v. Nellum, 24 M.J. 693 (A.C.M.R. 1987). Under Glazier, the adventurous may also seek to include inadmissible evidence in the stipulation and run the risk of being labeled "overreaching." United States v. Mullens, 24 M.J. 745 (A.C.M.R. 1987), aff'd, 29 M.J. 398 (C.M.A. 1990).

3. As with any important term, the trial counsel should tailor the automatic cancellation paragraph of the PTA to protect the government's interests. Here, the accused should be required to agree that the government will not be bound if the defense withdraws from the stipulation or objects to its contents at trial.

G. Stipulations of Testimony. Under R.C.M. 705(c)(2)(E), the accused may agree to waive the opportunity to request the personal appearance of witnesses at sentencing proceedings, i.e., agree to stipulate to their expected testimony. Such a bargain is not contrary to public policy, does not make a plea improvident, and may reflect foresight and calculation on the part of the defense. United States v. West, 13 M.J. 800 (A.C.M.R. 1982); United States v. McDonagh, 10 M.J. 698, aff'd, 14 M.J. 415 (C.M.A. 1981). Conversely, the government can

bargain for stipulations of testimony for its aggravation witnesses. United States v. Harrod, 20 M.J. 777 (A.C.M.R. 1985).

5305 **PROHIBITED TERMS OR CONDITIONS.** Involuntary PTA terms are unenforceable. The accused must freely and voluntarily agree to each provision.

A. Unwaivable Rights. In addition, the accused cannot be deprived of certain rights. No term will be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to speedy trial; the right to complete sentencing proceedings; or the complete and effective exercise of post-trial and appellate rights.

B. Capital Offenses. An accused may not plead guilty to a capital offense. R.C.M. 910(a)(1); United States v. Matthews, 16 M.J. 354 (C.M.A. 1983). Similarly, guilty pleas may not be entered for noncapital offenses which taken together constitute a capital offense, e.g., felony-murder. United States v. Dock, 28 M.J. 117 (C.M.A. 1989); UCMJ, Art. 118(4). The accused may, however, offer to plead guilty in exchange for a noncapital referral. United States v. Partin, 7 M.J. 409 (C.M.A. 1979).

5306 **WITHDRAWAL FROM PRETRIAL AGREEMENTS.**

Under R.C.M. 705(d)(5)(a), the accused may withdraw from a PTA at any time. Withdrawal from guilty pleas, however, are governed by R.C.M. 910(h). Per R.C.M. 705(d)(5)(b), the CA may withdraw from a PTA at any time before the accused begins performance of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review. Shepardson v. Roberts, 14 M.J. 354 (C.M.A. 1983); United States v. Manley, 25 M.J. 346 (C.M.A. 1987).

5307 **COMMON SENTENCING PROVISIONS.** The following list of provisions is to assist you in drafting the sentencing limitations of pretrial agreements. It is not an all-inclusive list; you may be inventive and draft any others which are allowed by the provisions of the Manual for Courts-Martial and current case law. Plain language is preferred and the terminology should be similar to that used in the CA's action. (See App. 16, MCM.)

A. Punitive Discharge

1. If awarded, a bad-conduct discharge (dishonorable discharge) (dismissal) will be disapproved.

2. If awarded, a bad-conduct discharge (dishonorable discharge) (dismissal) may be approved; however, it will be suspended for a period of ____ months from the date the sentence is adjudged, at which time, unless sooner vacated, it will be remitted without further action.

3. If awarded, a dishonorable discharge will be changed to a bad-conduct discharge. The sentence as changed may be approved.

B. Confinement or Restraint

1. If awarded, confinement may be approved; however, all confinement in excess of ____ months (years) will be suspended for a period of ____ months from the date the sentence is adjudged, at which time, unless sooner vacated, the suspended portion will be remitted without further action. In this regard, this pretrial agreement constitutes a request by the accused for and approval by the convening authority of deferment of the portion of any confinement to be suspended pursuant to the terms of the agreement. The period of deferment will run from the date the accused is released from confinement pursuant to this agreement until the date the convening authority acts on the sentence.

2. If awarded, confinement for ____ months (years) may be approved; however, all confinement in excess of ____ months (years) shall be suspended for a period of ____ months from the date the sentence is adjudged, at which time, unless sooner vacated, the suspended portion will be remitted without further action.

3. Conditional language

a. If a bad-conduct discharge (dishonorable discharge) (dismissal) is awarded, confinement, if also awarded, may be approved; however, all confinement in excess of ____ months (years) shall be suspended for a period of ____ months from the date sentence is announced, at which time, unless sooner vacated, the suspended portion will be remitted without further action.

b. If no bad-conduct discharge (dishonorable discharge) (dismissal) is awarded, confinement, if awarded, may be approved as adjudged.

NOTE: Both of these provisions would be present in the agreement. Also, the military judge, when examining the agreement, will seek assurances that such conditional terms originated with the defense offer to enter into the agreement.

4. If awarded, all confinement may be approved as adjudged.

5. Other forms of restraint: All other forms of restraint punishment may be approved as adjudged.

NOTE: This ensures that all parties agree that restriction or hard labor without confinement may be ordered executed in their entirety, notwithstanding limits on confinement approvable.

C. Forfeitures and Fines

1. If awarded, forfeitures may be approved; however, any forfeitures in excess of \$_____ pay per month for _____ months will be suspended for a period of _____ months from the date the sentence is adjudged, at which time, unless sooner vacated, the suspended portion will be remitted without further action.

2. If awarded, fines will be changed to forfeitures and subject to the limitations of paragraph 3.a, above.

3. If awarded, forfeitures and fines may be approved as adjudged.

D. Reduction (Rate or Grade)

1. If awarded, a reduction to paygrade E-* may be approved; however, any reduction below paygrade E-** will be suspended for a period of _____ months from the date the sentence is adjudged, at which time, unless sooner vacated, the portion of the reduction suspended will be yremitted without further action. Any reduction effected under Article 58a, UCMJ, and JAGMAN, § 0152, below paygrade E-** will also be suspended for a period of _____ months from the date the sentence is adjudged, at which time, unless sooner vacated, the portion of the reduction suspended will be remitted without further action.

2. If awarded, any reduction, whether judicially or administratively awarded, may be approved.

E. Other Lawful Punishments: All other lawful punishments not specifically mentioned in this agreement may be approved.

NOTE: This category should be added. It could include such punishments as loss of numbers, lineal position, seniority, reprimand, or other punishments listed in R.C.M. 1103(b). If any are anticipated, you may make specific mention of them or you can use the general provision above.

ADDITIONAL PRETRIAL AGREEMENT CASES

1. Stipulation as to aggravating circumstances: United States v. Sharper, 17 M.J. 803 (A.C.M.R. 1984).
2. Conditions of probation: United States v. Dawson, 10 M.J. 142 (C.M.A. 1981); United States v. Lallande, 46 C.M.R. 170 (C.M.A. 1973).
3. Waive venue motion: United States v. Kitts, 23 M.J. 105 (C.M.A. 1986).
4. Waive search and seizure motions: United States v. Holland, 1 M.J. 58 (C.M.A. 1975).
5. Waive objections to evidence: United States v. Robinson, 25 M.J. 528 (A.F.C.M.R. 1987).
6. Conditional sentence provisions: United States v. Hollcraft, 17 M.J. 1y111 (A.C.M.R. 1984); United States v. Cross, 21 M.J. 88 (C.M.A. 1988).
7. Proceed to trial by date certain: United States v. Mitchell, 15 M.J. 238 (C.M.A. 1983).
8. Agreement to refer case to SPCM: United States v. Stevens, 30 M.J. 686 (A.C.M.R. 1990); United States v. Kelly, 32 M.J. 835 (N.M.C.M.R. 1991).
9. Forward proposals to CA: United States v. Upchurch, 23 M.J. 501 (A.F.C.M.R. 1986).
10. Suspended punishments: United States v. Albert, 30 M.J. 331 (C.M.A. 1990); United States v. Elliot, 10 M.J. 740 (N.M.C.M.R. 1981); United States v. Panikowski, 8 M.J. 781 (A.C.M.R. 1980).
11. Uncovered punishments: United States v. Edwards, 20 M.J. 439 (C.M.A. 1985); United States v. Llewellyn, 27 M.J. 825 (C.G.C.M.R. 1989).
12. Article 58a automatic reduction: United States v. Cabral, 20 M.J. 269 (C.M.A. 1985).
13. Administrative discharge: United States v. Bedania, 12 M.J. 373 (C.M.A. 1982).

MEMORANDUM OF PRETRIAL AGREEMENT
GENERAL AND SPECIAL COURTS-MARTIAL

MEMORANDUM OF PRETRIAL AGREEMENT

UNITED STATES

Place _____

v.

Date _____

Name_____
Rate/Grade

SSN _____

I, _____, the accused in a _____ court-martial, do hereby certify:

That, for good consideration and after consultation with my counsel, I do agree to enter a voluntary plea of GUILTY to the charges and specifications listed below, provided the sentence as approved by the convening authority will not exceed the sentence hereinafter indicated by me;

That it is expressly understood that, for the purpose of this agreement, the sentence is considered to be in these parts, namely: the punitive discharge, period of confinement or restraint, amount of forfeiture or fine, and reduction in rate or grade;

That should the court award a sentence which is less, or a part thereof is less, than that set forth and approved in the agreement, then the convening authority, according to law, will only approve the lesser sentence;

That I am satisfied with my defense counsel in all respects and consider him qualified to represent me in this court-martial;

That this offer to plead guilty originated with me and my counsel; that no person or persons whomsoever have made any attempt to force or coerce me into making this offer or pleading guilty;

That my counsel has fully advised me of the meaning and effect of my guilty plea and that I fully understand and comprehend the meaning thereof and all of its attendant effects and consequences, including the possibility that I may be processed for an administrative discharge, even if part of all of the sentence, including a punitive discharge, is suspended or disapproved pursuant to this agreement;

That I understand that I may ask permission to withdraw my plea of guilty at any time before sentence is announced, and that the military judge may, at his discretion, permit me to do so; and

That I understand this offer and agreement and have been advised that it cannot be used against me in the determination of my guilt on any matters arising from the charges and specifications made against me in this court-martial.

That it is expressly understood that the pretrial agreement will become null and void in the event: (1) I fail to plead guilty to each of the charges and specifications set forth below, (2) the court refuses to accept my plea of guilty to any of the charges and specifications set forth below, (3) the court accepts each of my pleas but, prior to the time sentence is announced, I ask permission to withdraw any of my pleas, and the court permits me to do so, and (4) the court initially accepts my plea of guilty to each of the charges and specifications set forth below but, prior to the time the sentence is adjudged, the court sets aside any of my guilty pleas and enters a plea of not guilty on my behalf.

CHARGES PREFERRED:

GUILTY PLEA BY
ACCUSED TO:

<u>Article #</u>	<u>Description</u>	<u>Article #</u>	<u>Description</u>
------------------	--------------------	------------------	--------------------

1.

2.

MAXIMUM SENTENCE TO BE APPROVED BY CONVENING AUTHORITY

See maximum sentence appendix to memorandum of pretrial agreement.

Signed: _____
Name of accused/Date and Place

Witness: _____ [Defense counsel, date, and place;

_____ Statement of qualification where

_____ appropriate]

The foregoing agreement is [approved] [disapproved].

Signature, grade, and title of
convening authority

**MAXIMUM SENTENCE APPENDIX TO
MEMORANDUM OF PRETRIAL AGREEMENT**

UNITED STATES

Place _____

v.

Date _____

Name_____
Rate/Grade_____
SSN

Maximum Sentence to be approved by Convening Authority:

1. Punitive Discharge [character of and, if on probation, term thereof]
2. Confinement or Restraint [amount and kind]
- y
3. Forfeiture or fine [amount and duration]
4. Reduction to [rate or grade]

Signed: _____

Name of accused, date, and place

Witness: _____ [Defense counsel, date, and place]

Witness: _____ [Name, date, and place]

IMMUNITY

5308 **IMMUNITY GENERALLY.** Testimonial immunity, sometimes termed "use" immunity, immunizes a witness against the subsequent use of the testimony and any derivative use. In theory, testimonial immunity allows prosecution of the witness for the pertinent offenses using independent evidence. United States v. Lucas, 25 M.J. 9 (C.M.A. 1987). The government, however, has a heavy burden to prove that none of the evidence against the accused was derived directly or indirectly from his immunized testimony. United States v. Boyd, 27 M.J. 82 (C.M.A. 1988). Transactional immunity immunizes the witness against prosecution for any offenses concerning which the witness testified. In the military, the minimum form of immunity required by article 31 is use immunity. United States v. Rivera, 49 C.M.R. 259 (A.C.M.R. 1974), rev'd on other grounds, 1 M.J. 107 (C.M.A. 1975); Mil.R.Evid. 301(c)(1); R.C.M. 704(a) discussion.

5309 **AUTHORITY TO GRANT IMMUNITY.** Military personnel accused of offenses cognizable by court-martial may be granted immunity by the appropriate GCMA. United States v. Kirsch, 15 C.M.A. 84, 35 C.M.R. 56 (C.M.A. 1964); R.C.M. 704(c). As a general rule, an accused has no standing to contest the propriety of grants of immunity to prosecution witnesses. United States v. Martinez, 19 M.J. 744 (A.C.M.R. 1984), petition denied, 21 M.J. 27 (C.M.A. 1985). Grants of immunity for military personnel subject to trial by court-martial will also require approval by the Attorney General of the United States if the case could possibly have Department of Justice interest. Concurrent Federal civilian and military jurisdiction is possible. R.C.M. 704(c).

A. **Procedure.** The procedures involved in granting immunity are discussed in JAG Manual § 0130. In general, a written recommendation for immunity is forwarded to the general court-martial convening authority. That officer will act upon the request after referring it to the SJA for advice. In cases involving espionage, subversion, aiding the enemy, sabotage, spying, violation of rules or statutes concerning classified information or the foreign relations of the United States, or other national security matters, the approval of the Attorney General is required. Approval of the Attorney General or his designee may also be required in cases involving any "major federal crimes." See the MOU between DoD and DoJ in MCM, 1984, app. 3. Persons not triable by court-martial must be granted immunity by the Attorney General of the United States or by the GCM convening authority who has obtained approval from the Attorney General for such a grant. Title II, Organized Crime Control Act of 1970, 18 U.S.C. § 6004 (1970); R.C.M. 704(c)(2); JAG Manual § 0130c.

B. **"Equitable Immunity."** Under certain circumstances, the actions of a subordinate can effectively bind the GCMA in granting immunity. Cook v. Orser, 12 M.J. 335 (C.M.A. 1982) (C.M.A. enforced SJA's promises regarding

nonprosecution to an Air Force officer charged with failing to report contact with the Soviet Embassy on due process grounds); United States v. Brown, 13 M.J. 253 (C.M.A. 1982)(C.M.A. enforced SJA's promise made in exchange for "good information on drug activity"); United States v. Churnovic, 22 M.J. 401 (C.M.A. 1986)(C.M.A. enforced the command chief's promise that the accused would not get in trouble if he revealed the location of drugs).

5310 SCOPE OF IMMUNITY OUTSIDE THE MILITARY

A. Domestic Prosecutions. Under the single sovereign theory, military grants of immunity are binding on DoJ. Art. 76, UCMJ. Similarly, state prosecutors are prohibited from using any immunized testimony or derivative evidence. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

B. Foreign Prosecutions. The application of the fifth amendment right to matters involving possible foreign prosecution was left open by the Supreme Court in Zicarelli v. Commission of Investigation, 406 U.S. 472 (1974). At least three circuits have held that the possibility of grand jury testimony reaching the foreign country is so minimal that the fifth amendment privilege against self-incrimination is not raised. In re Tierney, 465 F.2d 806, 811-12 (5th Cir. 1972); In re Parker, 411 F.2d 1067, 1069-70 (10th Cir. 1969), vacated, 397 U.S. 96 (1970); In re Weir, 377 F. Supp. 919 (S.D. Cal.), aff'd, 495 F.2d 879 (9th Cir.), cert. denied, 419 U.S. 1038 (1974); In re Cahalane, 361 F. Supp. 226 (E.D. Pa.), aff'd, 485 F.2d 682 (3d Cir. 1973), cert. denied, 415 U.S. 989 (1974); United States v. Yanagita, 552 F.2d 940 (2d Cir. 1977)(Court found the privilege inapplicable to a witness at trial who refused to answer for fear of prosecution by Japan); In re Cardass, 351 F. Supp. 1080 (D. Conn. 1972).

5311 REFUSAL IN FACE OF THE GRANT. The witness is required to testify, on pain of trial for refusal to testify, and possibly contempt, if the grant was broad enough. United States v. Croley, 50 C.M.R. 899 (A.F.C.M.R. 1975). Fear for one's safety is not a defense in a case for refusal to testify. United States v. Quarles, No. 74-0537 (N.C.M.R. 28 March 1976) (unpublished).

5312 IMPACT ON CA AND SJA. In some cases, the grant of immunity may preclude these officers from taking post-trial review action if they or their subordinates recommend or grant either immunity or clemency for a witness in a case. But see United States v. Newman, 14 M.J. 474 (C.M.A. 1983)(Granting use immunity does not equate to expression of convening authority's views as to credibility of witness; CA was not necessarily disqualified from taking post-trial action on case).

5313 NOTICE TO THE ACCUSED. Mil.R.Evid. 301(c)(2) requires that grants of immunity (or lesser promises of leniency in exchange for testimony)

be in writing and served on the accused prior to arraignment (or within a reasonable time before the witness testifies). Otherwise, the witness involved may be disqualified from testifying. United States v. Webster, 1 M.J. 216 (C.M.A. 1976); United States v. Saylor, 6 M.J. 697 (N.C.M.R. 1978)(MJ has responsibility of fashioning a ruling designed to protect the accused's substantial rights); United States v. Carrol, 4 M.J. 674 (N.C.M.R.), aff'd, 4 M.J. 89 (C.M.A. 1977) (notice requirement may be waived).

5314 PROSECUTING THE FORMER IMMUNIZED WITNESS. If the government elects to prosecute an accused who had testified earlier pursuant to a grant of immunity, the government bears a heavy burden of showing in an article 39(a) session that it will be using independent, legitimate evidence against the accused. United States v. Whitehead, 5 M.J. 294 (C.M.A. 1978); United States v. Rivera, 1 M.J. 107 (C.M.A. 1975); United States v. Eastman, 2 M.J. 417 (A.C.M.R. 1975). The government will be required to prove, not merely represent, that no use was made of the immunized testimony. Thus, it may be appropriate, where prosecution of the immunized witness is contemplated, to make a record of evidence available against the witness prior to issuance of the grant. United States v. Gardner, 22 M.J. 28 (C.M.A. 1986)(Government discharged its burdens of proving that its evidence against the accused was not derived from his immunized testimony in a previous proceeding); R.C.M. 704 (a) discussion.

5315 COMPELLING THE GOVERNMENT TO IMMUNIZE DEFENSE WITNESSES. The majority rule of the Federal courts of appeal is that a criminal defendant has no constitutional right to have defense witnesses immunized. Under R.C.M. 704(e), the accused can request immunity for a defense witness from the appropriate GCMA. If the request is denied, the defense may renew the request before the military judge. The military judge must make two findings: (a) That the proffered testimony is of such central importance to the defense case that it is essential to a fair trial; and (b) that the witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify. If the defense satisfies both requirements, the military judge may grant relief by directing that the proceedings be abated unless an appropriate GCM convening authority grants immunity; military judges have no power to grant immunity themselves. The burden is on the defense to show the need for immunity. The standard of proof appears to be by a preponderance of the evidence. R.C.M. 905(c)(1); United States v. Villines, 13 M.J. 46 (C.M.A. 1982); United States v. O'Bryan, 16 M.J. 755 (A.F.C.M.R. 1983), petition denied, 18 M.J. 16 (C.M.A. 1984)(No abuse of discretion in refusing to grant immunity to a defense witness whose pretrial admission was not clearly exculpatory); United States v. James, 22 M.J. 929 (N.M.C.M.R. 1986)(No need to abate the proceedings where an alleged co-conspirator was not immunized; his expected testimony was only marginally exculpatory, and the government intended to prosecute him).

5316 **OTHER QUASI-IMMUNITY SITUATIONS.** Statements regarding past drug use or possession, which are made to appropriate persons in the course of voluntary self-referral and are made for treatment or rehabilitation purposes, may not be used for disciplinary purposes or to characterize a discharge. They may be used for impeachment or rebuttal, though, and the members' commanding officer has access to the statements. This limited use immunity does not prohibit disciplinary action or other adverse action based on independently derived evidence. OPNAVINST 5350.4 and MCO P5300.12. Similar protections exist for self-referral in the context of family violence under NAVMEDCOMINST 6320.22 series and statements made in epidemiological assessment interviews of members who are identified to be HIV positive, per SECNAVINST 5300.30C.

ORDER TO TESTIFY (See JAGMAN 0129e)
TRANSACTIONAL IMMUNITY

GRANT OF IMMUNITY

IN THE MATTER OF _____)

_____) GRANT OF IMMUNITY

_____)

_____)

To: (Witness to whom immunity is to be granted)

1. It appears that you are a material witness for the Government in the matter of if charges have been preferred, set forth a full identification of the accused and the substance of all specifications preferred.

2. In consideration of your testimony as a witness for the Government in the foregoing matter, you are hereby granted immunity from prosecution for any offense arising out of the matters therein involved concerning which you may be required to testify under oath.

3. It is understood that this grant of immunity from prosecution is effective only upon the condition that you actually testify as a witness for the Government. It is further understood that this grant of immunity from prosecution extends only to the offense or offenses which you were implicated in the matter herein set forth and concerning which you testify under oath.

Signature_____
Grade, title

USE IMMUNITY

GRANT OF IMMUNITY

IN THE MATTER OF _____)

_____) GRANT OF IMMUNITY

_____)

_____)

To: (Witness to whom immunity is to be granted)

1. It appears that you are a material witness for the Government in the matter of [if charges have been preferred, set forth a full identification of the accused and the substance of all specifications preferred.]

2. In consideration of your testimony as a witness for the Government in the foregoing matter, you are hereby granted immunity from the use of your testimony or other information given by you (or any other information directly or indirectly derived from such testimony or other information) against you in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with an order to testify in this matter.

3. It is understood that this grant of immunity from the use of your testimony or other information given by you (or other information directly or indirectly derived from such testimony or other information) against you in any criminal case is effective only upon the condition that you testify under oath as a witness for the Government.

Signature_____
Grade, title

ORDER TO TESTIFY
IN THE MATTER OF _____)

_____) ORDER TO TESTIFY

_____) _____)

_____) _____)

To: (Witness to whom immunity is to be granted)

1. As an officer empowered to convene general courts-martial and pursuant to the provision of sections 6002 and 6004, title 18, United States Code, I hereby make the following findings:

a. That (name of witness) possesses information relevant to the pending trial by general court-martial of _____, and that the presentation of his testimony at this trial necessary to the public interest; and

b. That it is likely that (Name of witness) would refuse to testify on the basis of his privilege against self-incrimination if subpoenaed to appear as a witness.

2. On the basis of these facts, and pursuant to section 6004, title 18, United States Code, I hereby order (Name of witness) to appear and testify before the general court-martial convened for the trial of _____. In accordance with section 6002, title 18, United States Code, no testimony or other information given by (Name of witness) (or any information directly or indirectly derived from such testimony or other information) can be used against him in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order.

3. This order is issued with the approval of the Attorney General of the United States set forth in enclosure 1 annexed hereto.

Signature_____
Grade, title

CHAPTER 54

CONVENING COURTS-MARTIAL

COURT-MARTIAL JURISDICTION

5401 **JURISDICTION OVER THE OFFENSE.** Under Solorio v. United States, 483 U.S. 435 (1987), jurisdiction of a court-martial over the offense depends solely on accused's status as a member of the armed forces. If the accused is a reservist, however, active duty status is not necessarily equivalent to subject matter jurisdiction. United States v. Chodara, 29 M.J. 943 (A.C.M.R. 1990). In any event, the abandonment of the service-connection test may require increased liaison with civilian prosecutors.

5402 **JURISDICTION OVER THE PERSON.** Article 2, UCMJ, provides jurisdiction over: enlistees; inductees; academy cadets/midshipmen, retirees, etc. Jurisdiction over retirees is constitutional. United States v. Hooper, 26 C.M.R. 417 (C.M.A. 1958); United States v. Overton, 24 M.J. 309 (C.M.A. 1987); Pearson v. Bloss, 28 M.J. 764 (A.F.C.M.R. 1989), pet. den., 28 M.J. 376 (C.M.A. 1989). See also, Reid v. Covert, 354 U.S. 1 (1957)(Persons accompanying or serving with the armed forces in the field in time of war); United States v. Harry, 25 M.J. 513 (A.F.C.M.R. 1987)(Sentenced prisoners).

5403 **JURISDICTION OVER RESERVISTS.** Under Art. 2(a)(1), (3), UCMJ and JAG Manual § 0102c, court-martial jurisdiction exists over reservists "while on inactive duty training" without any threshold requirements. Thus, Reserve members are subject to the UCMJ whenever they are in a Title 10 status: Inactive Duty Training (IDT), Active Duty Training (ADT), Annual Training (AT), or Active Duty (AD). United States v. Cline, 29 M.J. 83 (C.M.A. 1989).

A. Reservists on Active Duty. A reservist on active duty can be extended beyond his normal release date if he has been apprehended, arrested, confined, is under investigation, or charges have been preferred. R.C.M. 202(c); JAG Manual § 0122c(1). According to JAG (Code 20), a reservist on active duty can also be convicted at court-martial and confined without approval from SECNAV; still, it may be politically expedient to obtain Secretarial permission, as is required in cases involving reservists on IDT.

B. Reservists on IDT. Jurisdiction is not lost over reservists upon termination of IDT or ACDUTRA for an offense committed while subject to the UCMJ. Art. 3(d), UCMJ; JAG Manual 0116c(4).

1. Under JAG Manual § 0122c(2), a reservist on IDT may be retained on duty by an officer authorized to convene courts-martial for not more than two full working days past his scheduled training if:

- a. There is reasonable belief he committed an offense with a maximum punishment of more than 10 years confinement or death;
- b. approval for holdover is granted by a GCM authority in the accused's chain of command; and
- c. the officer empowered to convene courts-martial has requested a Regular component GCMCA to order the accused to active duty (for disciplinary action).

2. Recall. Regular component general court-martial convening authorities (GCMA) can recall reservists to active duty involuntarily for an art. 32 investigation, trial by court-martial, or imposition of NJP for offenses committed while on IDT or active duty. Art. 2(d), UCMJ; JAG Manual § 0116. Only a court-martial convening authority can generate a request to a GCMA to recall a reservist to active duty.

3. Pretrial Confinement. A reservist on IDT can be placed in pretrial confinement in accordance with R.C.M. 304 and 305 if ordered to active duty with Secretarial approval. JAG Manual § 0117d. An accused properly held over on active duty can be placed in pretrial confinement if the order to active duty receives SECNAV approval within two working days after the IDT was scheduled to terminate. JAG Manual § 0122c(2)(b).

4. Trial by Court-Martial. Before arraignment at a general or special court-martial, the reservist must be on active duty. R.C.M. 204(b)(1). Coordination between active and reserve components is required under Article 2(d), UCMJ. Summary courts-martial can be initiated and tried within the reserve structure and without active duty involvement. RCM 204(b)(2). The summary court-martial officer must be placed on active duty. Article 25, UCMJ; R.C.M. 1301. If given during IDT, trial and execution of punishments are limited to "normal" training periods. R.C.M. 204(b)(2). Confinement is not an available punishment during IDT. The recall to active duty must be approved by SECNAV before confinement is adjudged. Art. 2(d)(5), UCMJ.

5. Restraints on Liberty. Restraints on liberty cannot be extended beyond the normal IDT period, but may be carried over to later drill periods. JAG Manual §§ 0105a(7), 0122b. A reservist on inactive duty cannot be ordered to active duty to serve restraint punishment without SECNAV approval. Similarly, a reservist ordered to active duty for disciplinary purposes cannot be

extended on duty to serve restraint punishment, nor can he receive confinement as a sentence, unless the order to active duty was with SECNAV approval.

5404 INCEPTION OF JURISDICTION

A. Article 2, UCMJ. Any member who: submitted voluntarily to military authority; met the mental competence and minimum age qualifications of 10 U.S.C. 504 and 505 when enlisted; received military pay or allowances; and performed military duties, is subject to the UCMJ effective upon the taking of the oath of enlistment and continuously until terminated as discussed below.

B. Catlow and Russo. The jurisdictional quagmires encountered in United States v. Catlow, 23 C.M.A. 142, 48 C.M.R. 758 (1974)(coercion) and United States v. Russo, 1 M.J. 134 (C.M.A.1975)(recruiter misconduct plus a regulatory defect) have been rectified by the guidance in United States v. McDonagh, 14 M.J. 415 (C.M.A. 1983) and United States v. Marsh, 15 M.J. 252 (C.M.A. 1983). See also, United States v. Ghiglieri, 25 M.J. 687 (A.C.M.R. 1987)(Proposed enlistment as alternative to civil prosecution was not coercion); United States v. Hirsch, 26 M.J. 800 (A.C.M.R. 1988)(Recruiter misconduct or intoxication at the time of the oath can be cured by "constructive enlistment"); United States v. Ernest, 32 M.J. 135 (C.M.A. 1991)(Constructive enlistment applied to reservist on active duty training). The court-martial is competent to examine enlistment misrepresentation claims. Woodrick v. Divich, 24 M.J. 147 (C.M.A. 1987). Since habeas corpus is the appropriate remedy, military judges should give careful consideration to appropriate demands of comity if related proceedings are ongoing in federal court.

5405 TERMINATION OF JURISDICTION OVER THE PERSON

A. General rule. Generally, discharge terminates jurisdiction. In United States v. Kino, 27 M.J. 327 (C.M.A. 1989), C.M.A. listed three elements which make a discharge effective in this context: delivery of a valid discharge certificate; a final accounting of pay; and a "clearing" process as required under appropriate service regulations to separate the member from military service. See also, United States v. Scott, 11 C.M.A. 646, 29 C.M.R. 462 (1960); United States v. Howard, 20 M.J. 353 (C.M.A. 1985)(Jurisdiction terminates on delivery of discharge and final pay); United States v. Thompson, 21 M.J. 854 (A.C.M.R. 1986) (Delivery of DD Form 214 to member in entry level status terminates jurisdiction); United States v. Ray, 24 M.J. 657 (A.F.C.M.R. 1987)(Jurisdiction upheld where accused, on appellate leave awaiting discharge, was not provided discharge due to governmental error).

B. Exceptions. Exceptions to general rule that discharge terminates jurisdiction include:

1. Article 3(a), UCMJ offenses. Jurisdiction may exist where the accused was subject to the UCMJ at the time of the offense; the maximum court-martial punishment for that offense includes five or more years confinement; the person cannot be tried for the offense in an American civil court; and the person is subject to the UCMJ at the time of trial.

2. Erroneous Delivery. Jurisdiction will not be lost by an erroneous delivery. United States v. Garvin, 26 M.J. 294 (C.M.A. 1988); United States v. Brunton, 24 M.J. 566 (N.M.C.M.R. 1987).

3. Short-term discharge. United States v. Clardy, 13 M.J. 308 (C.M.A. 1982) (Discharge solely for the purpose of reenlistment does not terminate jurisdiction); United States v. Kino, 27 M.J. 327 (C.M.A. 1989) (Member who was given a discharge certificate for the purpose of reenlistment and then refused to reenlist is still subject to jurisdiction).

4. Fraudulent Discharge. Jurisdiction will not be lost where the discharge is procured by fraud. Wickham v. Hall, 12 M.J. 145 (C.M.A. 1981) (Administrative discharge for pregnancy), 706 F.2d 713 (5th Cir. 1983) (Habeas corpus relief denied). United States v. Cole, 24 M.J. 18 (C.M.A. 1987) (Court-martial has jurisdiction to determine if member fraudulently obtained discharge).

5. Article 3(c), UCMJ - Deserter obtaining discharge for subsequent period of service. United States v. Huff, 7 C.M.A. 247, 22 C.M.R. 37 (1956).

6. Persons in Custody of the Armed Forces Serving a Sentence Imposed by Court-Martial. Article 2(a)(7), UCMJ. United States v. Harry, 25 M.J. 513 (A.F.C.M.R. 1987) (punishment cannot include another punitive discharge).

7. Separation from Active to Reserve Status. Article 3 (d), UCMJ. Murphy v. Garrett, 29 M.J. 469 (C.M.A. 1990) (Jurisdiction existed over offenses committed on active duty for officer, who received an honorable discharge and simultaneously received a commission as a reserve officer and, who maintained contacts with the military through participation in reserve drills.)

C. Continuing jurisdiction beyond EAOS. Formerly, jurisdiction was not lost if: the member did not object to retention beyond the EAOS date; or, after the EAOS date, the member objected to retention but the government took official action with a view to trial within a reasonable time; or before the EAOS date, the government took official action that precisely and authoritatively signaled an intent to prosecute. United States v. Fitzpatrick, 14 M.J. 394 (C.M.A. 1983). Now, "jurisdiction to court-martial a servicemember exists despite delay -- even unreasonable delay -- by the Government in discharging that person at the end of

an enlistment...." United States v. Poole, 30 M.J. 149 (C.M.A. 1990). The member's objection is immaterial; the significant fact is that the member has yet to receive a discharge. Unreasonable delay, however, may provide a defense to "some military offenses."

5406 **PROCEDURAL CONSIDERATIONS.** For discussion of the requirement to plead jurisdiction, see United States v. Alef, 3 M.J. 414 (C.M.A. 1977). Lack of jurisdiction may be raised by a motion to dismiss under R.C.M. 907 at any stage of the proceeding. The government has the burden of persuasion by a preponderance of the evidence. United States v. Bailey, 6 M.J. 965 (N.M.C.M.R. 1979); R.C.M. 905(c); United States v. Marsh, 15 M.J. 252 (C.M.A. 1983) (For "peculiarly military" offenses like UA, an accused's military status is an element of the offense which must be proven beyond a reasonable doubt to the fact finders).

5407 **OTHER JURISDICTIONAL MATTERS.** The court must be properly composed, i.e., military judge and members must have proper qualifications. The court must be convened by proper authority. A properly constituted court-martial may try any person subject to the UCMJ, even if the accused is not under the command of the convening authority. United States v. Murphy, 30 M.J. 1040 (A.C.M.R. 1990). The charges must be properly referred. A defective referral where charges were referred to a different court-martial convening order than that actually used to try the accused was not jurisdictional error. United States v. Kino, 28 M.J. 397 (C.M.A. 1989). Referral of an offense punishable by death under the UCMJ to SPCM or BCD-SPCM requires GCMA approval. R.C.M. 201(f)(2).

5407 CONVENING SPECIAL COURT-MARTIAL CHECKLIST

A. Navy Pretrial Procedures

1. Check the service record out from personnel or PSD.
2. Copy the enlistment contract; pages 1, 2, 4, 5, 7, 9; all page 13's relating to NJP or disciplinary matters; and enlisted evaluations. These will be needed for preparation of CA's action if accused is convicted.
3. Establish liaison with the local NLSO regarding the pending charges. Follow their desired procedure regarding the forwarding of the charge sheet to their office.
4. Prepare the charge sheet, DD Form 458.
5. Prepare list of possible members from which commanding officer may choose the panel. If possible, avoid using members you know should be disqualified, such as accused's division officer or others from his same department. Have the commanding officer select the panel and prepare the convening order.
6. After the charges have been preferred by the legal clerk, have the commanding officer sign both the charge sheet and convening order.
7. Make sufficient copies of the charges and convening order. Check with the NLSO, but you will normally need the original and five copies of the charge sheet and six copies of the convening order. They will be distributed as follows: original charge sheet plus one copy to the trial counsel; one to defense counsel; one to military judge; one to the command files; and one to be served on the accused. Note, the original convening order remains in the command files, therefore the copy for the record of trial should be a certified copy.
8. Serve the accused with the charges and note the service on the original charge sheet prior to forwarding the others to the NLSO.
9. Forward appropriate copies of the charge sheet and convening order to the NLSO. Include the service record and copies of the investigation.

10. Make all arrangements necessary for the accused to see his lawyer and for the witnesses to be interviewed by counsel.
11. After being notified of the time and date of the trial, inform all witnesses and members, if necessary.
12. Arrange for a bailiff to escort the accused to the trial and to take custody after trial. Bailiff should be indoctrinated by NLSO staff for courtroom duties and by brig staff for any confinement, etc.
13. If confinement is expected, ensure the accused has a full sea bag by the date of the trial. His division officer should do this.
14. If confinement is expected, prepare a confinement order and assemble the pay record, health record, and dental record. Have TEMADD orders prepared prior to trial. If the accused receives more than 30 days effective confinement, or a BCD and any confinement, these must be changed to TEMDU orders later.

B. Marine Corps Pretrial Procedures

1. Assemble service record book, preliminary inquiry (or NIS investigation).
2. Audit service record book to assure it is up-to-date and contains no errors.
3. Complete request for legal services. Be sure to list witnesses and any who are pending transfer, discharge, or who will be unavailable within the near future. Also list five (5) approved court-martial officer members by full name, rank, unit, and phone number. Also request telephone notification to the LO when a specific trial counsel is assigned.
4. Make copies of request for legal services and allied papers and forward to Law Center/LSSS. (Be certain to have legal clerk who receives it sign your log as receiving the service record book.)
5. Upon receipt of the convening order and charge sheet upon which charges have been preferred, check to see that first page is completed and signed.
6. Have adjutant/personnel officer receipt for sworn charges and cause unit commander or his designee to personally notify the accused of charges and complete the notification block.

7. Have convening authority sign convening order first, then complete referral block.
8. Return charge sheet and convening order to Law Center/LSSS for service by trial counsel.
9. After reasonable period of time, call trial counsel for a trial date and notify prospective members that, if utilized, they will be needed during a specified time frame.
10. Assign a bailiff (senior to accused) and have them read the bailiff's handbook (NAVMARTRIJUDIC INST 5810.5) to learn their duties. Advise trial counsel who has been selected.
11. Prepare applicable parts of page 13, SRB.
12. If confinement is expected, prepare confinement orders, assemble health and dental records, and secure physical immediately before trial (or notify medical people of need).

SAMPLE CONVENING ORDER

LETTERHEAD

16 Jan CY

SPECIAL COURT-MARTIAL CONVENING ORDER 2-CY

A special court-martial is hereby convened. It may try such persons as may properly be brought before it. The court will be constituted as follows:

Lieutenant Commander Steven A. Miller, Jr., U.S. Navy;
Lieutenant Matthew J. Ferguson, SC, U.S. Naval Reserve;
Lieutenant Carol L. Parmley, U.S. Navy;
Lieutenant Junior Grade Peter C. Gaines, U.S. Navy; and
Ensign Roberto I. Jiminez, U.S. Naval Reserve.

JAMES D. WATKINS III
Captain, U.S. Navy
Commanding Officer
Naval Air Station, Oceana
Virginia Beach, Virginia

SAMPLE MODIFICATION

LETTERHEAD

5 Feb CY

GENERAL COURT-MARTIAL AMENDING ORDER 1A-CY

Chief Operations Specialist CWO3 Jeffrey T. Campbell, U.S. Navy, is detailed as a member of this general court-martial convened by order number 1-CY, this command, dated 29 January 19CY, vice Lieutenant Anthony R. Patrilli, U.S. Navy, relieved.

RICHARD J. ANDERSON
Rear Admiral, U.S. Navy
Commander, Naval Surface Group,
Middle Pacific

THE ARTICLE 32 INVESTIGATION

5408 **PURPOSE.** Article 32, UCMJ states: "No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made."

A. Investigate the Charges. The Article 32 investigation seeks to inquire into the truth of the matter alleged in the charges; consider the form of the charges; and make recommendations as to disposition of the charges. Its purpose is not to perfect a case against the accused, but rather to ascertain and weigh all the evidence in arriving at conclusions and recommendations.

B. Discovery. The investigation also serves as a means of discovery. United States v. Roberts, 10 M.J. 308 (C.M.A. 1981). The Article 32 also serves to preserve testimony which may be admissible at trial as a prior statement under MRE 801(d)(1) or as former testimony under MRE 804(b)(1). United States v. Conner, 27 M.J. 378 (C.M.A. 1989); United States v. Hubbard, 28 M.J. 27 (C.M.A. 1989); United States v. Spindle, 28 M.J. 35 (C.M.A. 1989).

C. Waiver of the Investigation. Under R.C.M. 905(e) and R.C.M. 705(c)(2)(E), the investigation may be waived as a condition of a pretrial agreement or for personal reasons. If waived for personal reasons, withdrawal of the waiver need only be permitted upon a showing of good cause. United States v. Nickerson, 27 M.J. 30 (C.M.A. 1988). The defense offer to waive is not binding on the government; the investigation may still be held.

D. Scope. The investigation should be limited to issues raised by the charges and necessary to proper disposition of the case. The IO's examination may extend beyond the witnesses and evidence mentioned in the accompanying papers. If charges are changed to allege a more serious or essentially different offense, further investigation should be directed with respect to the new or different matter. The IO's recommendations are advisory only. R.C.M. 405(a) discussion.

5409 **PLAYERS**

A. Appointing Authority. Any court-martial convening authority may direct an Article 32 investigation when it appears the charges may warrant trial by general court-martial. Typically, the special court-martial convening authority will order the investigation. The appointing authority need not be neutral and detached. United States v. Woiciechowski, 19 M.J. 577 (N.M.C.M.R. 1984).

B. Investigating Officer. The IO must be a commissioned officer, not a commissioned warrant officer. Preferably, the IO should be a field grade officer or an officer with legal training. The IO is disqualified from later acting in the case in any capacity. Serving in a judicial capacity, the IO must be impartial. Any advice on substantive matters must be from a neutral source. Those performing prosecutorial functions are not neutral. Non-neutral persons may only give advice on patently administrative matters. United States v. Payne, 3 M.J. 354 (C.M.A. 1977). Advice must not be given *ex parte*. *Ex parte* contacts by the investigating officer regarding substantive matters constitute error which will be tested for prejudice. The trial counsel may rebut the presumption of prejudice. United States v. Rushatz, 31 M.J. 450 (C.M.A. 1990); United States v. Brunson, 17 M.J. 181 (C.M.A. 1983).

5410 PROCEDURAL ISSUES

A. Witnesses. The Article 32 officer must produce a witness or other evidence if the defense makes a timely request and the witness or evidence is "reasonably available." In making that determination, the IO balances the significance of the witness or evidence against the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance or obtaining the evidence. R.C.M. 405(g). The immediate commander of the requested witness may determine that the witness is not reasonably available, effectively exercising a veto of the request. If deemed reasonably available, civilian witnesses will be invited to attend; the investigation has no subpoena power. Payment of transportation and per diem to civilian witnesses must be approved by the GCMCA. Civilians can later be compelled by subpoena to testify at a deposition. R.C.M. 702.

B. Evidence. The Military Rules of Evidence do not apply, save M.R.E. 301, 302, 303, 305, and Section V. R.C.M. 405(i). The Article 32 investigation, while an important pre-trial right, is not a crucial trial right for Confrontation Clause purposes. United States v. Bramel, 29 M.J. 958 (A.C.M.R. 1990) (Not improper for accused to be separated from child witness by a screen at Article 32).

C. Processing. The appointing authority should require expeditious proceeding and set a deadline for receipt of record of investigation in the appointing order. The report of investigation should be forwarded to GCMCA within 8 days if the accused is in pretrial confinement. R.C.M. 405(j)(1) discussion.

D. Curing Defects. To preserve any objection to the investigation, the defense must move for appropriate relief at trial. Prejudice is presumed if not rebutted. Ordinarily, the remedy is a continuance to re-open the investigation. R.C.M. 906(b)(3) discussion. If the charges have already been referred, re-referral is not required after the investigation is re-opened; affirmance of the prior

referral, if appropriate, is sufficient. United States v. Clark, 11 M.J. 179 (C.M.A. 1981); United States v. Packer, 8 M.J. 785 (N.M.C.M.R. 1980).

5411 ARTICLE 32/34 CHECKLIST

A. ARTICLE 32 INVESTIGATION. (See R.C.M. 405 & 406; JAGMAN, § 0908; and UCMJ, Arts. 32-34.)

1. Obtain service record from personnel or PSD.
2. Establish liaison with local NLSO regarding pending charges and obtain name of article 32 investigating officer.
3. Draft charges on DD Form 458. Complete charge sheet through block IV only, DO NOT refer charges.
4. Prepare the appointing order for the article 32 investigating officer.
5. Make sufficient copies of charge sheet and appointing order for distribution to all necessary parties and one copy for the command files. The original appointing order will be attached to the investigation, it is not kept in the command files.
6. Forward the charge sheet, appointing order (and the copies of each), plus the service record and any investigative reports, to the NLSO.
7. After receipt of the completed article 32 investigation and the investigating officer's report, forward to your commanding officer for a determination as to disposition.
8. If a general court-martial is desired, forward service record, the investigation, and investigating officer's report to the GCM authority requesting the appropriate action.

SAMPLE APPOINTING ORDER FOR
ARTICLE 32 PRETRIAL INVESTIGATION

DEPARTMENT OF THE NAVY
Naval Justice School
Newport, Rhode Island 02841-5030

22 Aug 19CY

In accordance with R.C.M. 405, MCM, 1984, Lieutenant Commander Pretrial I. Officer, JAGC, U.S. Navy, is hereby appointed to investigate the attached charges preferred against Seaman Watt A. Accused, U.S. Navy. The charge sheet and allied papers are appended hereto. The investigating officer will be guided by the provisions of R.C.M. 405, MCM, 1984, and current case law relating to the conduct of pretrial investigations. In addition to the investigating officer hereby appointed, the following personnel are detailed to the investigation for the purposes indicated:

COUNSEL FOR THE GOVERNMENT

Lieutenant I. Will Convictim, JAGC, U.S. Navy, certified in accordance with Article 27(b), Uniform Code of Military Justice;

DEFENSE COUNSEL

Lieutenant I. Gettum Off, JAGC, U.S. Naval Reserve, certified in accordance with Article 27(b), Uniform Code of Military Justice.

CONVENING T. AUTHORITY

Captain, JAGC, U.S. Navy
Commanding Officer
Naval Justice School
Newport, Rhode Island

DEPARTMENT OF THE NAVY
Naval Justice School
Newport, Rhode Island 02841-5030

2 Sep 19CY

**FIRST ENDORSEMENT on LCDR Pretrial I. Officer, JAGC, USN,
Investigating Officer's Report of 30 Aug CY**

**From: Commanding Officer, Naval Justice School
To: Commander, Naval Education and Training Center, Newport**

**Subj: ARTICLE 32 INVESTIGATION ICO SEAMAN WATT A. ACCUSED,
U.S. NAVY, 123-45-6789**

1. Forwarded.
2. Recommend trial by general court-martial.

CONVENING T. AUTHORITY

THE ARTICLE 34 PRETRIAL ADVICE

5412 **CONTENTS OF PRETRIAL ADVICE.** The pretrial advice letter is a formal document containing the SJA's written advice regarding the charges as required under Article 34, UCMJ, as a prerequisite to trial by GCM.

A. **Mandatory Contents.** Although more may be included, the pretrial advice is streamlined and is only required to include:

1. Conclusions with respect to whether each specification alleges an offense under the code;
2. Conclusions with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of investigation (if there is a report);
3. Conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense; and
4. Recommendation of the action to be taken by the convening authority.

B. **Legal Effect.** The three legal conclusions are binding on the convening authority; the SJA's recommended disposition is not. The SJA need not set forth the underlying analysis or rationale for the conclusions. R.C.M. 406(b) discussion.

C. **Optional Contents.** "The pretrial advice should include when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; and any previous recommendations, by commanders or others who have forwarded the charges, for disposition of the case." R.C.M. 406(b) (Discussion). Failure to include optional information is not error.

5413 **PREPARATION AND DISTRIBUTION.** The trial counsel may draft the pretrial advice for the SJA's consideration. United States v. Hardin, 7 M.J. 399 (C.M.A. 1979). The SJA, however, is personally responsible for it and must make an independent and informed appraisal of the charges. The SJA must personally sign it. United States v. Haves, 24 M.J. 786 (A.C.M.R. 1987) (Signature of another "For the SJA" was inadequate). A copy of the pretrial advice must be given to the accused if the charges are referred to a GCM.

5414 **DEFECTS IN THE PRETRIAL ADVICE.** Objections are waived if not raised prior to entry of plea or if the accused pleads guilty. R.C.M.

905(b), (e); United States v. Packer, 8 M.J. 785 (N.C.M.R. 1980). Failure to provide a written pretrial advice to the convening authority is error which will be tested for actual prejudice. United States v. Murray, 25 M.J. 445 (C.M.A. 1988); United States v. Nelson, 28 M.J. 553 (A.C.M.R. 1989). Similarly, streamlining can be carried too far. Information which is so incomplete as to be misleading may result in a defective advice and warrant relief. R.C.M. 406(b) discussion. United States v. Kemp, 7 M.J. 760 (A.C.M.R. 1979).

5415 CHECKLIST FOR ARTICLE 34 ADVICE/REFERRAL OF CHARGES

- A. Upon receipt of a request for a general court-martial by a summary or special court-martial convening authority, review the service record and investigation.
- B. Prepare the advice and recommendation concerning the charges for the flag officer per Article 34, UCMJ and R.C.M. 406, MCM, 1984.
- C. If the flag officer agrees to refer the charge(s) to a general court-martial, then prepare block V of the charge sheet (DD Form 458).
- D. Prepare a list of possible members, so the convening authority may pick the panel, and prepare the convening order for signature.
- E. After referral, serve the accused with a copy of the charges and note this on the charge sheet.
- F. Prepare sufficient copies of the charge sheet and convening order for distribution to all parties. Retain the original convening order and send a certified copy with the original charge sheet for inclusion in the record of trial.
- G. Copy the enlistment contract and pages 1, 2, 4, 5, 7, 9 (and any page 13's relating to NJP's or disciplinary matters) and enlisted evaluations. These may be needed for preparation of the CA's action if the accused is convicted.
- H. Forward the service record, charge sheet, article 34 advice, investigating officer's report with the investigation, and any other investigative reports to the NLSO for action.
- I. Contact the accused's command for a bailiff and other requirements for the accused in case he is confined (sea bag, pay record, health record, etc.).

- J. Prepare a confinement order and TEMADD orders in case the accused is confined.

SAMPLE ARTICLE 34 LETTER**MEMORANDUM**

From: Staff Judge Advocate

To: Commander, Naval Education and Training Center, Newport

Subj: ADVICE AND RECOMMENDATIONS CONCERNING THE CHARGES
AGAINST SEAMAN WATT A. ACCUSED, U.S. NAVY, 123-45-6789

Ref: (a) Article 32, UCMJ

(b) R.C.M. 406, MCM, 1984

Encl: (1) Charge sheet

(2) Article 32 investigation w/fwd ltr CO, NAVJUSTSCOL

1. Per reference (a), an investigation has been conducted into the following charge and specification against Seaman Watt A. Accused, U.S. Navy, 123-45-6789.

Charge and Specification: See enclosure (1).

2. The charge and specification have been forwarded with a recommendation for trial by general court-martial by Commanding Officer, Naval Justice School, Newport, Rhode Island. The investigating officer, Lieutenant Commander Pretrial I. Officer, JAGC, U.S. Navy, recommended trial by general court-martial of the charge and specification. The investigation was conducted on 30 August 19CY. The pretrial investigation report and forwarding letter, dated 2 September 19CY, are attached [enclosure (2)].

3. Per reference (b), the following advice concerning the charge and specification is furnished:

a. The investigation was conducted in substantial compliance with reference (a). The evidence consisted of one government exhibit received into evidence.

b. The specification alleges an offense under the UCMJ.

c. The allegations in the specification are warranted by the evidence adduced at the investigation.

d. Court-martial jurisdiction has been established over the accused and the offense.

4. Discussion of the charge and specification:

a. Elements:

(1) That the accused, on or about 1 June 19CY, absented himself from his organization, that is, Naval Justice School, Newport, Rhode Island;

(2) that he remained so absent until 18 August 19CY;

(3) that the absence was without authority from anyone competent to give him leave;

(4) that the accused intended at the time of absenting himself, or at some time during his absence, to remain away permanently from his organization; and

(5) that the accused's absence was terminated by apprehension.

b. Discussion of proof:

(1) IO Exhibit (2), a true copy of a NAVPERS 1070/606 (Record of Unauthorized Absence) from the service record of the accused, provides evidence which establishes probable cause to believe that, on or about 1 June 19CY, the accused absented himself from his organization, to wit: Naval Justice School, Newport, Rhode Island; that he remained so absent until 18 August 19CY; that the absence was without authority from anyone competent to give him leave; and that the absence was terminated by apprehension. The intent of the accused to remain away permanently can be inferred from the length of the absence (78 days), and the accused's apprehension in Tucson, Arizona, some distance from Newport, Rhode Island.

(2) If the intent of the accused to remain away permanently is not proved beyond a reasonable doubt, the accused may be found guilty of a lesser included offense of unauthorized absence in violation of Article 86, UCMJ.

(3) The statute of limitations, for both article 85 and article 86, is five years. The receipt of the preferred charges by Commanding Officer, Naval Justice School, Newport, Rhode Island, on 20 August 19CY, has tolled the running of the statute of limitations and this issue is moot.

5. Maximum authorized punishment:

a. Dishonorable Discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1, in the event the accused is convicted of a violation of Article 85, UCMJ.

b. Dishonorable Discharge, confinement for 1 year 6 months, forfeiture of all pay and allowances, and reduction to E-1, in the event the accused is convicted of a violation of Article 86, UCMJ.

6. Additional information relative to case:

a. A review of the accused's service record reflects the following misconduct resulting in disciplinary action:

CO's NJP - 14 Jan CY - Violation of Article 86, UCMJ, UA from 15 Oct CY(-1) to 23 Dec CY(-1).

AWARDED: 15 days restriction, 15 days extra duty, and forfeiture of \$50.00 pay per month for one month.

b. The accused is 24 years of age, single, and enlisted in the U.S. Navy on 1 January 19CY(-1), for a period of 4 years. His GCT is 45, his ARI is 53, and he completed the 12th grade of school. His average performance marks are 3.4. He is entitled to no awards, medals, or decorations.

7. In summary, my advice is that there has been substantial compliance with reference (a), the specification alleges an offense under the Code and the allegations in the offense are warranted by the evidence contained in the investigation. I recommend the charge and specification be referred to trial by general court-martial.

8. You may indicate your agreement or disagreement with the foregoing in the place provided below. If you agree with the advice and recommendation herein, you should sign the referral to trial on page two of the Charge Sheet (DP Form 458) [enclosure (1)].

R. U. GUILTY

APPROVED/DISAPPROVED

COURT-MARTIAL PERSONNEL UPDATE

5416 **CONVENING AUTHORITY.** Under R.C.M. 503(a), the convening authority shall detail qualified persons as members for courts-martial. SJAs have a duty to ensure that CAs follow the criteria of Article 25. Their mistakes may taint the CA's official actions based on erroneous legal guidance. United States v. Hilow, 29 M.J. 641 (A.C.M.R. 1989)(CA believed he was supposed to select nominees who supported a command policy of "hard discipline"; CA said this guidance came from SJA personnel). [Additional panel selection cases are discussed below under "Court Members."] Occasionally, the DC will attack the actions of a CA who is the "Acting" commander. If service regulations are followed, i.e., Succession Command; U.S. Navy Regulations, 1990, Articles 1070-1088, few problems will arise. Even so, C.M.A. has stated that the concern is for the realities of command, not the intricacies of service regulations. United States v. Jette, 25 M.J. 16 (C.M.A. 1987); United States v. Yates, 28 M.J. 60 (C.M.A. 1989)(No reversal simply because director of reserve component support was senior to deputy post commander, where there was no protest to the assumption of command and no objection was raised at trial).

5417 **DISQUALIFICATION OF COUNSEL.** Generally, one who has acted for the government is disqualified as DC. United States v. Sparks, 29 M.J. 52 (C.M.A.1989)(If accused, "after full disclosure and inquiry by military judge, wishes to be represented by defense counsel who previously acted for prosecution, accused has no complaint so long as chosen counsel meets customary standards for professional competence." Conversely, judge advocates who represent the accused may be disqualified from later representing the government if: former representation existed; a substantial relationship between the subject matters exists; and there was a later proceeding. United States v. Rushatz, 31 M.J. 450 (C.M.A. 1990)(Accused met with legal assistance attorney who later moved to prosecutor's office and disclosed to TC that he had represented accused on unrelated matter; held no attorney-client relationship here concerning the same or related matter).

5418 **ACCUSED'S RIGHT TO PROCEED PRO SE UNDER R.C.M. 506(d).** The Supreme Court has held that the defendant's right to counsel includes the right of self-representation. In addition to the proverbial notion about the wisdom of pro se clients, the military right to self-representation is not absolute. United States v. Freeman, 28 M.J. 789 (N.M.C.M.R. 1989)(A higher standard for competence must exist in order for an accused to waive counsel and conduct his own defense than would be required to merely assist in his own defense while being represented by counsel); United States v. Bramel, 29 M.J. 958 (A.C.M.R. 1990)(Request for self-representation, like IMC request,

should be made in good faith and not solely to vex the prosecution or the court). See also, United States v. Bowie, 21 M.J. 453 (C.M.A. 1986); United States v. Tanner, 16 M.J. 930 (N.M.C.M.R. 1983).

5419 **PROFESSIONAL STANDARDS OF COUNSEL.** The notion of ineffective assistance of counsel typically conjures up an image of an error in the midst of a contested court-martial. Recent cases indicate that appellate courts will scrutinize pretrial activities carefully as well. United States v. Kino, 30 M.J. 59 (C.M.A. 1990)(Accused was denied effective assistance by his counsel's superficial representation designed to avoid an attorney-client relationship); United States v. Polk, 32 M.J. 150 (C.M.A. 1991)(Counsel deemed ineffective for failing to explore the possibility of co-actor's testimony or to obtain a substitute for the testimony if co-actor refused to testify). In addition, courts have examined the DC's discharge of post-trial responsibilities. United States v. Harris, 30 M.J. 580 (A.C.M.R. 1990)(DC's responsibilities do not end at close of trial; DC must review case and bring forth all legal issues and clemency matters which might assist the accused); United States v. Dorsey, 30 M.J. 1156 (A.C.M.R. 1990)(Civilian DC did not prepare or present any meaningful presentencing evidence; did not submit clemency matters because he felt it was "useless to petition the convening authority"); United States v. Martinez, 31 M.J. 524 (A.C.M.R. 1990)(DC's ineffective assistance illustrated by accused's untimely, hand-written clemency request to the CA).

Counsel for the government and the defense must conduct themselves appropriately. United States v. Hebert, 32 M.J. 707 (A.C.M.R. 1991)(During a recess and in presence of some of the members, TC said the accused was a "guilty son-of-a-bitch" who "was going to jail"; no impact on deliberations.

5420 **COURT MEMBERS.** Per Article 25, UCMJ, members are to be selected on the basis of their age, experience, education, training, length of service, and judicial temperament. When it can be avoided, court members should not be junior in rank to the accused. United States v. McGee, 15 M.J. 1004 (N.M.C.M.R. 1983)(Failure to object results in waiver). The CA cannot exclude any group or class on irrelevant, irrational, or prohibited grounds. United States v. Nixon, 30 M.J. 1210 (A.C.M.R. 1990)(en banc)(Although the CA selected senior NCOs (E9s and E8s), he did not categorically exclude the lower grades from consideration; no illegal or improper motive shown). On the other hand, deliberate inclusion may serve the interests of justice. United States v. Smith, 27 M.J. 242 (C.M.A. 1988)(CA may take gender into account in selecting court members, if seeking in good faith to ensure that a court-martial panel is representative of the military population). See also, United States v. McClain, 22 M.J. 124 (C.M.A. 1986); United States v. Hilow, 27 M.J. 685 (A.C.M.R. 1989), pet. den., 28 M.J. 354 (C.M.A. 1989); United States v. Hodge, 26 M.J. 596 (A.C.M.R. 1988) *aff'd*, 29 M.J. 304 (C.M.A. 1989).

5421 **MILITARY JUDGE.** Recent case law confirms the expanding power of military judges to call the court into session at any time after referral, United States v. Scaff, 29 M.J. 60 (C.M.A. 1989), and post-trial prior to authentication. United States v. Griffith, 27 M.J. 42 (C.M.A. 1988). See also, United States v. Beckermann, 27 M.J. 334 (C.M.A. 1989); United States v. Stiner, 30 MJ 860 (N.M.C.M.R. 1990).

CHAPTER 55

RECURRING PROCEDURAL ISSUES AND MOTIONS

UNLAWFUL COMMAND INFLUENCE

5501 **INDEPENDENT DISPOSITION AUTHORITY.** Each commander, at every level, is vested with independent discretion, which by law, may not be impinged upon. Senior commanders may not dictate dispositions to a lower-level commander.

A. Permissible Actions. The commander MAY, however, personally dispose of a case at the level authorized for that offense and for that commander or at any lower level. Senior commanders may withdraw subordinate authority on particular types of cases and take cognizance over major offenses disposed of at NJP by a subordinate commander. Per United States v. Pierce, 27 M.J. 367 (C.M.A. 1989), the CA must give the accused credit for article 15 punishment previously received for an offense later punished by court-martial. United States v. Burum, 30 M.J. 1075 (A.C.M.R. 1990). Commanders can always send a case back to a lower commander for that lower commander's independent action. Conversely, the commander may forward a case to a higher commander with a recommendation for disposition. R.C.M. 601(f); United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983).

B. Guidance. Commanders may express opinions and provide guidance, provided the subordinate has a free choice to accept or reject the superior's views. Guidelines on appropriate levels of disposition and punishment are inappropriate. An accused is entitled to have the immediate commander exercise independent discretion in the disposition of charges. United States v. Hawthorne, 22 C.M.R. 83 (C.M.A. 1956) (Directive which required that accused members having two prior convictions be tried by GCM was an unlawful interference with the subordinate's independent discretion).

5502 **FLEXIBILITY**

A. Disposition. The commander must not have an inflexible policy on disposition or punishment. As a judicial authority, the convening authority must consider each case individually on its own merits.

B. Clemency. The convening authority may approve or disapprove findings, and suspend and reduce sentences. As a judicial appellate authority, the convening

authority has a duty to review military justice actions impartially. An inflexible attitude towards clemency dictates a loss of judicial authority.

United States v. Howard, 48 C.M.R. 939 (C.M.A. 1974)(CA showed inflexibility by stating "all convicted drug dealers say the same things [M]y answer to [their] appeals is 'No'"); United States v. Glidewell, 19 M.J. 797 A.C.M.R. (1985)(CG showed inflexibility by stating he could not understand how a battalion commander could allow a soldier to be court-martialed and then testify at trial about the soldier's good character); United States v. Fernandez, 24 M.J. 77 (C.M.A. 1987)(CA's letter urging commanders to be aggressive in the detection and prosecution of drug dealers did NOT indicate inflexibility).

5503 **ACCUSERS.** An accuser, actual or nominal, may not dispose of the case. As a judicial authority, the convening authority who possesses more than an official interest in a case cannot fairly act in the matter. The appearance of impropriety must be avoided. The accuser concept does not apply to enforcement of general regulations, punishments at NJP, or trial by summary court-martial.

5504 **COURT-MARTIAL MEMBERS**

A. **Selection.** Court members may not be selected, removed, or replaced to obtain a particular result. The convening authority chooses court members using the criteria of Article 25, UCMJ: Age; education; training and experience; length of service; and judicial temperament. The same criteria apply to modifications.

B. **Influence.** No outside pressures may be placed on the judge or court members to arrive at a particular decision. Instructing members on their immediate responsibilities in court-martial proceedings is the sole province of the military judge. The member's may not be influenced by command policies. United States v. Brice, 19 M.J. 170 (C.M.A. 1985)(CG's speech on drugs during recess of a drug trial resulted in mistrial); United States v. Walk, 26 M.J. 665 (A.F.C.M.R. 1988)(Judge's sentencing instruction conveying command policy of generally not retaining those involved in drugs was plain error).

5505 **WITNESSES.** Witnesses may not be intimidated or discouraged from testifying, directly or indirectly. United States v. Charles, 15 M.J. 509 (A.F.C.M.R. 1982)(Commander's advice to a witness for the accused to modify his comments if possible was "inexcusable"); United States v. Saunders, 19 M.J. 763 (A.C.M.R. 1984)(Commander told defense witnesses in the waiting room on the day of trial he wanted the accused get the maximum punishment); United States v. Levite, 25 M.J. 334 (C.M.A. 1987)(Conviction set aside where members of the command were briefed before trial on the accused's "bad character" and NCOs who testified for the accused were told "that they had embarrassed" the unit); United States v. Kitts, 23 M.J. 105 (C.M.A. 1986)(SJA briefed crew on pending courts-martial; despite good intentions, had potential for unlawfully influencing the outcome of trials); United States v. Lowery, 18 M.J. 695 (A.F.C.M.R. 1984)(Chilling

effect of the commander's lecturing a defense witness after they have testified); United States v. Jones, 30 M.J. 849 (N.M.C.M.R. 1990)(Chilling effect of relieving two drill instructors immediately after they testified for the accused).

5506 **INFLUENCING THE MILITARY JUDGE.** No person may invade the independent discretion of the military judge. Article 37, UCMJ. Command and SJA inquiries which question or seek justification for a judge's decision are prohibited unless made in connection with an independent judicial commission per the guidelines of section 9.1(a), ABA Standards, The Function of the Trial Judge. United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976). Nor can the command attempt to influence the neutral and detached decisions of the IRO. United States v. Rice, 16 M.J. 770 (A.C.M.R. 1983)(Deputy SJA asked the senior judge to call the IRO to explain the seriousness of a certain pretrial confinement issue). Even judges must avoid actions which create the appearance of attempting to influence subordinate judges. United States v. Mabe, 28 M.J. 326 (C.M.A. 1989), on remand, 30 M.J. 1254 (N.M.C.M.R. 1990)(Letter from the chief trial judge of the Navy to the chief judge of the Transatlantic Judicial Circuit appeared to relay complaints concerning inordinately lenient judge-alone sentences).

5507 **CORRECTING MISTAKES**

A. **Command Action.** Remedial actions may be taken at various stages of the proceeding, tailored to the nature of the potential harm. The offending party can rectify an ambiguous remark with a clarifying policy pronouncement. United States v. Sullivan, 26 M.J. 442 (C.M.A. 1988)(Command told all personnel that testifying was their duty; offender transferred to remove his input in the evaluation process).

B. **Trial Judge Action.** The judge can take remedial action when unlawful command influence is discovered at the trial level. United States v. Southers, 18 M.J. 795 (A.C.M.R. 1984)(Granting liberal challenges for cause against members who heard unlawful comments); United States v. Giarratano, 22 M.J. 388 (C.M.A. 1986)(No unfavorable character evidence permitted against the accused; commander disqualified as reviewing authority); United States v. Sullivan, 26 M.J. 442 (C.M.A. 1988)(Government given blanket order to produce all requested defense witnesses; each advised of duty to testify truthfully and that no adverse retaliatory would be taken). Judges may grant liberal continuances granted to allow cleansing actions to take effect.

C. **Appellate Action.** Appellate courts may take any remedial action necessary from ordering a new recommendation and action, United States v. Howard, 48 C.M.R. 943 (C.M.A. 1974), to overturning the findings and sentence overturned. United States v. Levite, 25 M.J. 334 (C.M.A. 1987). Once unlawful command influence is raised, CMA will not affirm unless convinced beyond a reasonable doubt that the findings and sentence were not affected. United States v. Thomas, et al., 22 M.J. 388 (C.M.A. 1986), cert. denied, 107 S.Ct. 1289 (1987).

5508 ADDITIONAL UNLAWFUL COMMAND INFLUENCE

A. Policy directives. United States v. Eland, 17 M.J. 596 (N.M.C.M.R. 1983); United States v. Grady, 15 M.J. 275 (C.M.A. 1983).

B. Contact with Members. United States v. Cole, 38 C.M.R. 94 (C.M.A. 1967); United States v. Hollcraft, 17 M.J. 1111 (A.C.M.R. 1984).

C. Contact with Witnesses. United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984), aff'd, 23 M.J. 151 (C.M.A. 1986).

D. Command control. United States v. Smith, 27 M.J. 242 (C.M.A. 1988); United States v. Hedges, 29 C.M.R. 458 (C.M.A. 1960); United States v. McClain, 22 M.J. 124 (C.M.A. 1986); Petty v. Moriarty, 43 C.M.R. 278 (C.M.A. 1971).

E. Burdens. United States v. Anderson, 26 M.J. 555 (A.C.M.R. 1988); United States v. Allen, 31 M.J. 572 (N.M.C.M.R. 1990).

F. Appearance Doctrine. United States v. Rosser, 6 M.J. 267 (C.M.A. 1979); United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985), rev'd in part, 25 M.J. 326 (C.M.A. 1987); United States v. Allen, 31 M.J. 572 (N.M.C.M.R. 1990).

FOURTH AMENDMENT MATERIALS

5509 **PROBABLE CAUSE CHECKLIST.** The following checklist may be helpful in advising commanders presented with a request by an investigator to authorize a search.

- A. Find out the name and duty station of the applicant requesting the search authorization.
- B. Administer an oath to the person requesting authorization: "Do you solemnly swear that the information you are about to provide is true to the best of your knowledge and belief, so help you God?"
- C. What is the location and description of the premises, object, or person to be searched? Ask yourself:
 - 1. Is the person or area one over which I have jurisdiction?
 - 2. Is the person or place described with particularity?
- D. What facts indicate that the property to be seized is actually located in the place to be searched?
- E. Who is the source of this information? If the source is any person other than the applicant who is before you, consult the checklist for informants.
- F. What training have you had in investigating offenses of this type or in identifying this type of contraband?
- G. Is there any further information you believe will provide grounds for the search for, and seizure of, this property?
- H. Are you withholding any information you possess on this case which may affect my decision on this request to authorize the search?
- I. If you are satisfied as to the reliability of the information and that of the person from whom you receive it, and you then entertain a reasonable belief that the items are where they are said to be, then you may authorize the search and seizure. It should be done along these lines: "(Applicant's name), I find that probable cause exists to issue an authorization to search (location or person) for the following items: (Description of items sought)"

5510 INFORMANT CHECKLIST

A. The basis of the informant's knowledge. The commander must find what facts (not conclusions) were given by the informant to indicate that the items sought will be in the place described.

B. The commander must then find that either the informant is reliable or his information is reliable. To gauge the informant's reliability, ask:

1. How long has the applicant known the informant?
2. Has this informant provided information before?
3. Has the past information always proven correct? Almost always? Never?
4. Has the informant ever provided any false or misleading information?
5. (If drug case) Has the informant ever identified drugs in the presence of the applicant?
6. Has any prior information resulted in conviction? Acquittal? Are there any cases still awaiting trial?
7. What other situational background information was provided by the informant that substantiates believability (e.g., accurate description of interior of locker room, etc.)?

C. Questions to determine that the information provided is reliable:

1. Does the applicant possess other information from known reliable sources, which indicates what the informant says is true?
2. Do you possess information (e.g., personal knowledge) which indicates what the informant says is true?

5511 **SPECIFICITY CHECKLIST.** No search authorization will be valid unless the place to be searched and the items sought are particularly described.

A. Description of the place or the person to be searched.

1. Persons. Always include all known facts about the individual, such as name, rank, SSN, and unit. If the suspect's name is unknown, include a personal description, places frequented, known associates, make of auto driven, usual attire, etc.

2. Places. Be as specific as possible, with great effort to prevent the area which you are authorizing to be searched from being broadened, giving rise to a possible claim of the search being a "fishing expedition."

B. What can be seized. Go from the general to the specific.

1. Contraband. Contraband is anything which is illegal to possess, e.g., "Narcotics, including, but not limited to, heroin, paraphernalia for the use, packaging, and sale of said contraband, including, but not limited to, syringes, needles, lactose, and rubber tubing."

2. Unlawful weapons. Unlawful weapons are made illegal by some law or regulation, e.g., "Firearms and explosives including, but not limited to, one M-60 machine gun, M-16 rifles, and fragmentation grenades, together with any parts thereof."

3. Evidence of crimes

a. Fruits of a crime, e.g., "Household property, including, but not limited to, one G.E. clock, light-blue in color, and one Sony fifteen-inch, portable, color TV, tan in color with black knobs."

b. Tools or instrumentalities of crime. Property used to commit crimes, e.g., "Items used in measuring and packaging of marijuana for distribution, including, but not limited to, cigarette rolling machines, rolling papers, scales, and plastic baggies."

c. Evidence which may aid in solving a particular crime, e.g., "Papers, documents, and effects which show dominion and control of said area, including, but not limited to, canceled mail, stenciled clothing, wallets, receipts."

SAMPLE REQUEST FOR AUTHORIZATION

WITH THE UNITED STATES ARMED FORCES AT Newport County, Newport, Rhode Island, Continental USA

1. I, Robert T. Jacobs, Naval Investigative Service Resident Agency, Newport, RI, having first been duly sworn, state that larceny of a Panasonic AM/FM radio Model RF-593, SN 00610, with a broken antenna from YN2 Douglas Wright, USN, on 10 January 19CY has been committed.

2. I further state that BM1 Jonathan P. Rhodes was visiting YN2 Richard R. Blue in Bldg. 346, Rm 13 B, NETC, Newport, RI, on 15 Jan CY. BM1 Rhodes saw a Panasonic AM/FM radio with a broken antenna which fit the description of a radio stolen from YN2 Douglas Wright. BM1 Rhodes informed me via phone conversation what he had witnessed. I talked with BM1 Rhodes on 15 Jan CY in my office, and he again went over the facts in more detail. BM1 Rhodes' CO informed me that BM1 Rhodes is a very trustworthy individual.

3. In view of the foregoing, the undersigned requests that permission be granted for the search of YN1 John T. Green's living area and wall locker, Bldg 346, Rm 13B, NETC, Newport, Rhode Island, and seizure of a Panasonic AM/FM radio Model RF-593, SN 00610.

Signature

Typed name and organization

JURAT

I, SA James Q. Summerville, do hereby certify that the foregoing request for authorization to conduct search and seizure was subscribed and sworn to before me this 16th day of Jan, 19CY, by SA Robert T. Jacobs, who is known to me to be a Special Agent with the U.S. Armed Forces. And I do further certify that I am on this date empowered to administer oaths by authority of Article 136, UCMJ.

Signature

Typed name, grade, and branch
of service

Command or Organization

SAMPLE AFFIDAVIT FOR SEARCH AUTHORIZATION

UNITED STATES OF AMERICA

V.

YEOMAN FIRST CLASS JOHN T. GREEN, U.S. NAVY

Before the Commander, Naval Education and Training Center, Newport, Rhode Island The undersigned, being duly sworn, requests authority to search:

Living area and wall locker of YN1 John T. Green, Building 346, Room 13B, Naval Education and Training Center, Newport, Rhode Island

Believing that there is now being concealed certain property, namely:

Panasonic AM/FM Radio, Model RF-593, SN 00610, with a broken antenna

The request for authorization to search and seize is made in connection with an investigation into the offense(s) of:

Article 121: Larceny

The facts and circumstance known to me tending to establish the foregoing grounds for authorization to search and seize, including comments demonstrating the reliability of the information and/or informant, are as follows:

SA Robert T. Jacobs was informed by BM1 Jonathan Rhodes that BM1 Rhodes had been visiting YN2 Richard R. Blue on 15 Jan CY. YN2 Blue shares Rm 13B, Bldg 346, NETC, Newport, RI with YN1 John T. Green. BM1 Rhodes saw a Panasonic AM/FM radio of the same description which YN2 Douglas Wright had reported stolen. BM1 Rhodes immediately notified SA Jacobs. BM1 Rhodes' Commanding Officer states BM1 Rhodes is a very trustworthy individual.

Signature of affiant

Sworn to before me, and subscribed in my presence this 16th day of January 19CY.

Signature of person administering oath

Rank, Service, Title

RECORD OF AUTHORIZATION FOR SEARCH (see JAGMAN 0170)**RECORD OF AUTHORIZATION FOR SEARCH**

1. At (time) on (date) I was approached by (name) in his capacity as (duty) who having been first duly sworn, advised me that he suspected (name) of (offense) and requested permission to search his (object or place) for (particular items) .

2. The reasons given to me for suspecting the above named person were:

3. After carefully weighing the foregoing information, I was of the belief that the crime of [had been] [was being] [was about to be] committed, that was the likely perpetrator thereof, that a search of the object or area stated above would probably produce the items stated and that such items were [the fruits of crime] [the instrumentalities of a crime] [contraband] [evidence].

4. I have therefore authorized to search the place named for the property specified, and if the property is found there, to seize it.

Grade

Signature

Title

Date and Time

[NOTE: See JAG Manual Appendix A-1-n for detailed instruction on completion of this form.]

SAMPLE RECORD OF AUTHORIZATION FOR SEARCH**RECORD OF AUTHORIZATION FOR SEARCH**

1. At 1340 hours on 16 January 19CY, I was approached by Robert T. Jacobs in his capacity as Special Agent, Naval Investigative Service who having been first duly sworn, advised me that he suspected YN1 John T. Green, USN of Article 121, UCMJ, larceny and requested permission to search his wall locker an living area Bldg. 346, Rm 13B, NETC for Panasonic AM/FM Radio, Model RF-593, SN 00610

2. The reasons given to me for suspecting the above named person were:

On 15 Jan CY, BM1 Jonathan P. Rhodes, USN, was visiting YN2 Richard R. Blue, USN. YN2 Blue lives in Rm 13B, Bldg 346, NETC, Newport, RI. His roommate is YN1 John T. Green. While in Rm 13B, Bldg 346, BM1 Rhodes observed a radio in YN1 John T. Green's area. It was a small Panasonic radio with a broken antenna. BM1 Rhodes was aware through a conversation with YN2 Douglas Wright, that YN2 Wright's radio had been stolen early in January 19CY. YN2 Wright had described his radio to BM1 Rhodes as a Panasonic with a broken antenna.

3. After carefully weighing the foregoing information, I was of the belief that the crime of larceny [had been] committed, that a search of the object or area stated above would probably produce the items stated and that such items were [the fruits of crime]

4. I have therefore authorized Special Agent Robert T. Jacobs, NIS to search the place named for the property specified, and if the property is found there, to seize it.

Captain _____, Commander, Naval Education and Training Center, Newport, Rhode Island, 16 January 19CY, 1440.

COMMAND AUTHORIZATION FOR SEARCH AND SEIZURE

UNITED STATES OF AMERICA

V.

YEOMAN FIRST CLASS JOHN T. GREEN, U.S. NAVY

To Special Agent Robert T. Jacobs:

Affidavit(s) having been made before me by Special Agent Robert T. Jacobs

That there is reason to believe that on the person of and/or on the premises known as:

Living area and wall locker of YN1 John T. Green, USN, Bldg 346, Room 13B, Naval Education and Training Center, Newport, Rhode Island, which is my jurisdiction.

There is now being concealed certain property, namely:

Panasonic AM/FM Radio, Model RF-593, SN 00610, with a broken antenna

I am satisfied that there is probable cause to believe that the property so described is being concealed on the person and/or premises above described and that the grounds for application for issuance of a command authorized search exist as stated in the supporting affidavit(s).

YOU ARE HEREBY AUTHORIZED TO SEARCH the person and/or place named for the property specified and if the property is found there to seize it, leaving a copy of this authorization and receipt for the property taken. You will provide a signed receipt to this command, containing a full description of every item seized.

Any assistance desired in conducting this search will be furnished by this command.

Dated this 16th day of January 19CY.

Signature of Commander

Rank, Service, Title

Command

CONSENT TO SEARCH (See JAGMAN 0170)**CONSENT TO SEARCH**

I, _____, have been advised that inquiry is
b e i n g m a d e i n c o n n e c t i o n w i t h

_____. I have been advised of
my right not to consent to a search of [my person] [the premises mentioned below].

I hereby authorize _____ [and]

_____, who [has] [have been] identified to me as
(position(s)) _____ to conduct a complete search of my [person]
[residence] [automobile] [wall locker] [] [] located at

_____. I
authorize the above listed personnel to take from the area searched any letters,
papers, materials, or other property which they may desire. This search may be
conducted on _____. This written permission is being given by me to the
above named personnel voluntarily and without threats or promises of any kind.

Signature

WITNESSES

SAMPLE CONSENT TO SEARCH

I, YN1 John T. Green, USN, have been advised that inquiry is being made in connection with larceny of a Panasonic AM/FM Radio from YN2 Douglas Wright, USN, on 10 January 19CY.

I have been advised of my right not to consent to a search of [my person] [the premises mentioned below].

I hereby authorize SA Robert T. Jacobs, who has been identified to me as a Special Agent, GS-6, with Naval Investigative Service Resident Agency, Newport, RI to conduct a complete search of my residence wall locker located at Building 346, Rm 13B, Naval Education and Training Center, Newport, Rhode Island.

I authorize the above listed personnel to take from the area searched any letters, papers, materials, or other property which they may desire. This search may be conducted on 16 January 19CY.

This written permission is being given by me to the above named personnel voluntarily and without threats or promises of any kind.

Signature

Witnesses

SAMPLE SEARCH AND SEIZURE INSTRUCTIONINSTRUCTION 5510.3A

Subj: SEARCHES AND SEIZURES

Ref: (a) Mil.R.Evid. 315

1. Purpose. To establish the authority of various members of the U.S. Naval Ballistics Command to order searches of persons and property and to promulgate regulations and guidelines governing such searches.

2. Cancellation. NAVBALCOM Instruction 5510.3 is hereby cancelled.

3. Objective. To ensure that every search conducted by members of this command is performed in accordance with the law. For purposes of this instruction, "search" is defined as a quest for incriminating evidence.

4. Authority

a. Reference (a), as modified by court decisions, authorizes a commanding officer to order searches of:

- (1) Persons subject to military law and to his authority;
- (2) persons, including civilians, situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under his control;
- (3) privately owned property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under his control;
- (4) U.S. Government-owned or controlled property under his jurisdiction, which has been issued to an individual or group of individuals for their private use;
- (5) all other U.S. Government-owned or controlled property under his jurisdiction; and
- (6) in foreign countries, persons subject to military law and to his authority and any property of such persons located anywhere in the foreign country.

b. As to property described in paragraph 4(a)(5) above, a search may be conducted at any time, by anyone in military authority on the scene, for any reason,

or for no reason at all. Any property seized as a result of such a search will be handled per paragraph 7 below.

c. Items or other evidence seized as a result of a search of persons or property falling within paragraphs 4a(1), (2), (3), or (4) above, will be admissible in a subsequent court proceeding only if the search was based on probable cause. This means that, before the search is ordered, the person ordering the search is in possession of facts and information, more than mere suspicion or conclusions provided to him by others, which would lead a reasonable person to believe that: (a) An offense has been committed; and (b) the proposed search will disclose an unlawful weapon, contraband, evidence of the offense or of the identity of the offender, or anything that might be used to resist apprehension or to escape.

d. Before deciding whether to order any search of persons or property described in paragraphs 4(a)(1), (2), (3), or (4) above, the officer responsible is required to take all reasonable steps consistent with the circumstances to ensure that his source of information is reliable and that the information available to him is complete and correct. He must then decide whether such information constitutes probable cause as defined above. In making this determination, the responsible officer is exercising a judicial, as opposed to a disciplinary, function.

e. Ordinarily, the Commanding Officer, U.S. Naval Ballistics Command, will be the officer responsible for authorizing searches of persons or property described in paragraphs 4a(1), (2), (3), or (4), above, in this command. If the commanding officer is unavailable and full command responsibilities have devolved to another (normally the executive officer), that person then exercising full command responsibilities is permitted to authorize searches and seizures.

5. Criteria

a. When so acting, the individual empowered to authorize searches will exercise discretion in deciding whether to order a search in accordance with the general criteria set forth above. No search will be ordered without a thorough review of the information to determine that probable cause, where required, exists. Due consideration will be given to the advisability of posting a guard or securing a space to prevent the tampering with or alteration of spaces while a further inquiry is conducted to effect a more complete development of the facts and circumstances giving rise to the request for a search.

b. The following examples are intended to assist the responsible officer in placing the persons or property to be searched within the proper category (set forth in paragraph 4a, above):

(1) Members of the armed forces and civilians accompanying armed forces in a combat zone in time of war;

(2) all persons, servicemembers and civilians, situated on or in a military installation, encampment, vessel, aircraft, or vehicle;

(3) automobiles, suitcases, civilian clothing, privately-owned parcels, etc., physically located on or in a military installation, encampment, etc., and owned or used by a servicemember or a civilian;

(4) lockers issued for the stowage of personal effects, government quarters, or other spaces or containers issued to an individual for his private use;

(5) the working spaces of this command, including restricted-access spaces, in the custody of one or a group of individuals where no private use has been authorized (e.g, a wall safe, gear lockers, government vehicles, government briefcases, and government desks); or

(6) persons under the authority of this command and their personal property, including vehicles located on or off base when located in a foreign country.

6. **Exception.** In circumstances involving vehicles, the interests of the safety or security of a command, or the necessity for immediate action to prevent the removal or disposal of stolen property may leave insufficient time to obtain prior authorization to conduct a search. Under such circumstances, any officer of this command, on the scene in the execution of his military duties, is authorized to conduct a search without prior authorization from the commanding officer. When so acting, such officer is limited by all the requirements set forth above. He must determine that the person or property to be searched falls within one of the categories set forth, that his information is reliable to the extent permitted by the circumstances, and that probable cause, if required, is present. He shall inform the command duty officer of all the facts and circumstances surrounding his actions at the earliest practicable time.

7. Instructions

a. If circumstances permit, place the person requesting the authorization to search under oath or affirmation prior to giving such authorization. This oath or affirmation should be substantially in accordance with the one suggested in JAGMAN, app. A-1-n(2), para. 2.

b. Any person authorizing a search pursuant to this instruction may do so orally or in writing, but in every case the order shall be specific as to who is to conduct the search, what person(s) or property are to be searched, and what item(s) or information are expected to be found on such person(s) or property. At the time the search is ordered, or as soon thereafter as practicable, the individual authorizing the search will set forth the time of authorization, the particular persons or property to be searched, the identity of the persons authorized to conduct the search, the items

or information which was expected to be found, a complete discussion of the facts and information he considered in determining whether or not to order the search, and what effort, if any, was made to confirm or corroborate these facts and information. This report will be forwarded to the commanding officer and will be supplemented at the earliest practicable time by a written report, setting forth any items seized as a result of the search, together with complete details, including location of their seizure and location of their stowage after seizure.

c. Where possible, searches authorized by this instruction will be conducted by at least two persons not personally interested in the case, at least one of whom will be a commissioned officer, noncommissioned officer, or petty officer.

d. Once a search is properly ordered pursuant to this instruction, it is not necessary to obtain the consent of any individual affected by the search; however, such consent may be requested.

e. Frequently, it will appear desirable to interrogate suspects in connection with an apparent offense. It is essential that the function of interrogation be kept strictly separate and apart from the function of conducting a search pursuant to this instruction. This instruction does not purport to establish any regulations or guidelines for the conduct of an interrogation.

f. Personnel conducting a search properly authorized by this instruction will search only those persons or spaces ordered. If, in the course of the search, they encounter facts or circumstances which make it seem desirable to extend the scope of the search beyond their original authority, they shall immediately inform the person authorizing the search of such facts or circumstances and await further instructions.

g. Personnel conducting a search properly authorized by this instruction will seize all unlawful items which come to their notice in the course of the search, even if their existence was not known or anticipated before the search began. These unlawful items fall within the following categories:

(1) Unlawful weapons (i.e., any weapon the mere possession of which is prohibited by law or lawful regulation);

(2) contraband (i.e., any property the mere possession of which is prohibited by law or lawful regulation);

(3) any evidence of a crime (e.g., the fruits or products of any offense under the Uniform Code of Military Justice, or instrumentalities by means of which any such offense was committed); and

(4) any object or instrumentality which might be used to resist apprehension or to escape.

h. Any property seized as a result of a search shall be securely tagged or marked with the following information:

- (1) Date and time of the search;
- (2) identification of the person or property being searched;
- (3) location of the seized article when discovered;
- (4) name of person ordering the search; and
- (5) signature(s) of the person(s) conducting the search.

i. No person conducting a search shall tamper with any items seized in any way, but shall personally deliver such items to the senior member of the search team. In the event that size or other considerations preclude the movement of any seized items, one of the persons conducting the search shall personally stand guard over them until notification is made to the person authorizing the search and receipt of further instructions.

j. No person acting to authorize a search under the provisions of this order shall personally conduct the search. Such persons should also avoid, where possible and practical, being present during its conduct.

k. Any person authorizing a search based upon this instruction should be careful to avoid any action which would involve him in the evidence-gathering process of the search.

l. The person conducting a search should, when possible, notify the person whose property is to be searched. Such notice may be before or during the search. Any property seized shall be inventoried then or as soon as practicable. A copy of the inventory shall be given to a person from whose possession or premises the property was taken.

m. Nothing in this instruction shall be construed as limiting or affecting in any way the authority to conduct searches pursuant to a lawful search warrant issued by a court of competent jurisdiction, or pursuant to the freely given consent of one in the possession of property, or incident to the lawful apprehension of an individual. The JAG Manual contains suggested forms for recording information pertaining to the authorization for searches and the granting of consent to search. Use these forms whenever practicable.

(signed) COMMANDING OFFICER

5512

RECENT SEARCH AND SEIZURE CASES

A. Seizure. United States v. Phillips, 30 M.J. 1 (C.M.A. 1990)(Accused was "seized" within the meaning of the Fourth Amendment when after MPI agent displayed his credentials, stopped taxi from leaving, asked accused to get out of the taxi, and demanded accused's ID card, the agent failed to tell the accused he could leave and failed to return the ID card, which was indispensable for the soldier's movement in Korea).

B. PX Detectives. United States v. Baker, 30 M.J. 262 (C.M.A. 1990)(Although they may not be "investigative or law enforcement officers" for FTCA purposes, PX detectives are governmental officials for purposes of Fourth Amendment analysis, i.e., required to read Article 31 warnings to servicemembers suspected of a crime. United States v. Quillen, 27 M.J. 312 (C.M.A. 1988)).

C. Plain View Doctrine. United States v. Jacobs, 31 M.J. 138 (C.M.A. 1990)(Security policeman's act of observing and recording serial numbers on suspected stolen items which were in plain view and which were not moved was not a search).

D. Consent to Search. United States v. Goudy, 32 M.J. 88 (C.M.A. 1991)(Accused's consent to search his room was voluntarily given to his commander based on the totality of the circumstances. Factors: (1) Article 31 warnings were read; (2) commander never ordered accused to consent; (3) agent gave oral and written advice that accused did not have to consent; (4) commander told accused he needed consent; (5) accused was intelligent, experienced, and articulate, not submissive ; and (6) no threats were made. Article 31 warnings are not required prior to requesting consent to search, but are a factor showing voluntariness).

See the urinalysis section in chapter 56 of this Deskbook for additional search and seizure cases in that context.

FIFTH AND SIXTH AMENDMENT UPDATE

5513 SOURCES OF THE RIGHTS

A. The Fifth Amendment. "No person... shall be compelled in any criminal case to be a witness against himself.... "

B. Article 31(a), UCMJ. "No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him."

C. Article 31(b). "No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him. ... "

D. The Sixth Amendment. "In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence."

5514 ARTICLE 31 WARNINGS

A. Who Must Warn? Article 31 warnings must be given if: a questioner subject to the Code was acting in an official capacity in his inquiry, i.e., not only a personal motivation; and the person questioned perceived that the inquiry involved more than a casual conversation. United States v. Duga, 10 M.J. 206 (C.M.A. 1981)(Everett: Article 31(b) applies "only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry).

B. Duga Progeny. United States v. Loukas, 29 M.J. 385 (C.M.A. 1990)(Article 31 warnings were not required prior to aircraft crew chief's questioning of crew member about drug use where questions were limited to those needed to "fulfill operational responsibilities, and there was no evidence suggesting his inquiries were designed to evade constitutional or codal rights"; Article 31 "requires warnings only when questioning is done during an official law-enforcement investigation or disciplinary inquiry"); United States v. Parrillo, 31 M.J. 886 (A.F.C.M.R. 1990)(Air Force sergeant acting as agent of OSI was not required to read Article 31 warnings before questioning lieutenant about drugs. Although questioning was official, lieutenant perceived it as casual conversation because of prior sexual relationship with the sergeant); United States v. Quillen, 27 M.J. 312 (C.M.A. 1988)(Civilian PX detective was required to advise a soldier suspected of shoplifting of his Article 31 rights before questioning him. The detective was an "instrument of the military" whose conduct in questioning the suspect was "at the behest of military authorities and in furtherance of their duty to investigate crime"; the suspect perceived the detective's questioning to be more than casual conversation); United States v. Moore,

32 M.J. 56 (C.M.A. 1991)(Psychiatric nurse was not required to read rights warnings prior to questioning accused about child sexual abuse when questioning was done only for legitimate medical purpose of gauging the depth of the accused's depression. Quillen-type argument that psychiatric nurse was an agent of law enforcement and required to read Article 31 warnings rejected because current AR 608-18 was not in effect).

C. When Must Warnings be Given? Warnings must be given prior to any interrogation, questioning, or other request for a statement from a person subject to the UCMJ who is suspected of an offense.

1. Interrogation Defined. Interrogation under M.R.E. 305(b)(2) "includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning."

2. Cases. United States v. Steward, 31 M.J. 259 (C.M.A. 1990)(OSI agent impermissibly interrogated suspect prior to rights warnings by saying: "Wayne, from this point on you are grounded. You can either cooperate with us and try to get your wings back or lose your wings forever." A.F.C.M.R. erred by relying on "presumptive taint" to suppress the confession because of this "technical violation of Article 31(b)"); United States v. Kramer, 30 M.J. 805 (A.F.C.M.R. 1990)(OSI agent's false statements about evidence against ATM card thief followed by question, "We are not going to see your face on the tape are we?" was "functional equivalent of interrogation"; despite subtlety of the approach, it was designed to obtain an incriminating response and should have been preceded by warnings); United States v. Schake, 30 M.J. 314 (C.M.A. 1990) (Behavioral Analysis Interview is a "form of police interrogation, especially when it entails direct questioning about an interviewee's involvement in a crime"; technique is designed to use noninvestigative questions to evoke verbal and nonverbal responses that are useful to police).

5515 THE RIGHT TO COUNSEL AND COUNSEL WARNINGS

A. Source. Miranda v. Arizona, 384 U.S. 436 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed").

B. Progeny. Illinois v. Perkins, 110 S.Ct. 2394 (1990)("[A]n undercover law enforcement officer posing as a fellow inmate need not give Miranda warnings to an incarcerated suspect before asking questions that may elicit an incriminating response" about an uncharged offense. "Miranda forbids coercion, not strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner.")

C. Exercise of Rights. Under M.R.E. 305(f), "[i]f a person chooses to exercise the privilege against self-incrimination or the right to counsel ... questioning must cease immediately." The rule does not address whether or when questioning may be resumed.

1. The Right to Counsel. Edwards v. Arizona, 451 U.S. 477 (1981)([W]hen an accused has invoked his right to ... counsel, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.... [A]n accused... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation. .. until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police"); Minnick v. Mississippi, 111 S.Ct. 486 (1990)("[W]e now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney."); Arizona v. Roberson, 486 U.S. 675 (1988)(There is no exception to Edwards for post-request, police-initiated, custodial interrogation relating to a separate investigation: "As a matter of law, the presumption raised by a suspect's request for counsel -- that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance -- does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation." The fact that the officer who conducted the second interrogation did not know of the request for counsel is of "no significance.")

2. Exceptions to the Edwards per se Rule.

a. Counsel "Made Available." United States v. Kino, 30 M.J. 59 (C.M.A. 1990)("[W]e are not precisely clear as to whether counsel secured under the Fifth Amendment must invariably be present at any reinitiation of contact or whether, once substantial legal services have been provided, there are any exceptions to the presence requirement. ... The brief visitation of counsel here was insufficient to permit receipt in evidence of any confession secured by investigators upon their own initiation of contact"); United States v. Fassler, 29 M.J. 193 (C.M.A. 1990) (Ten-minute long-distance telephone consultation with defense counsel was not "constructive presence" of an attorney that might satisfy Miranda); United States v. Schake, 30 M.J. 314 (C.M.A. 1990) (Accused who requested counsel during police interrogation could be reinterrogated following a 6-day break in continuous custody and a complete rights advisement where accused had a "real opportunity to seek legal advice" during his release); Minnick v. Mississippi, 111 S.Ct. 486 (1990)("In context, the requirement that counsel be "made available" means more than an opportunity to consult with an attorney outside the interrogation room. ... [W]hen counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.")

b. Initiation and waiver by the accused. Minnick v. Mississippi, 111 S.Ct. 486 (1990)("Edwards does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities.")

5516 CONFESSIONS AFTER IMPROPER POLICE CONDUCT

A. After an Illegal Arrest or Search. New York v. Harris, 110 S.Ct. 1640 (1990)(Where police have probable cause to arrest a suspect, the exclusionary rule does not bar the use of the suspect's statement made outside his home, even though the statement is taken after a warrantless and non-consensual arrest made in violation of Payton v. New York, 445 U.S. 573 (1980); warrant requirement is designed to protect the home, so any evidence seized there, including the suspect's first statement, was properly excluded. Attenuation analysis of Brown and Dunaway is not required for subsequent station-house confession because, unlike those cases, police here had probable cause to make the arrest and, therefore, the challenged evidence was not the product of illegal governmental activity); United States v. Mitchell, 31 M.J. 914 (A.F.C.M.R. 1990)(Harris applied; statement made to police who entered accused's motel room based on probable cause, but without a warrant or his consent should have been suppressed; written statement given three days later was admissible); Minnesota v. Olson, 110 S.Ct. 1684 (1990)(Statement given in police station following warrantless, non-consensual arrest in home of another where suspect was a guest and had legitimate expectation of privacy excluded as fruit of illegal arrest; although police had probable cause to arrest the suspect, the "State expressly disavowed any claim that the statement was not a fruit of the arrest"; Court declined to apply New York v. Harris sua sponte).

B. After an Inadmissible Confession. United States v. Schake, 30 M.J. 314 (C.M.A. 1990)("[T]he doctrine of presumptive taint for Article 31 violations espoused by Chief Judge Everett in United States v. Ravenel has not gained the support of a majority of this Court." Even assuming taint, it was rebutted where (1) no admissions were made during the first interrogation; (2) rights warnings were given prior to second statement; (3) different investigator conducted second interview; and (4) most importantly, 6 days passed between the unwarned and warned interviews); United States v. Steward, 31 M.J. 259 (C.M.A. 1990)(Mere "technical violations of Article 31(b)" do not presumptively taint subsequent warned statements; although the "presumptive taint doctrine" permits rebuttal of such taint, that attenuation approach is inappropriate when there is no initial tainting statement and proper advice is provided before the confession; the appropriate legal inquiry in these types of cases is whether his subsequent confession was voluntary considering all the facts and circumstances of the case including the earlier technical violation of Article 31(b)); United States v. Phillips, 32 M.J. 76 (C.M.A. 1991)(An unwarned statement obtained without actual coercion does not presumptively taint a subsequent, warned statement; Government must prove by a preponderance of the evidence, however, that the warned statement was voluntary and was not obtained by using the earlier

statement; if the initial statement is the product of actual coercion, duress, or inducement, it does presumptively taint subsequent warned statements; cleansing warnings, although not legally required, will help show voluntariness.); United States v. McCaig, 32 M.J. 751 (A.C.M.R. 1991)(When statement is taken in violation of Article 31, subsequent statement must be voluntary and not the product of the prior violation in order to be admissible; factors showing voluntariness: time lapse; new rights warnings; new questioner; cleansing warnings; questioner's references to prior admissions; whether accused admitted prior admission did not influence him; changed conditions; and whether illegal conduct "let the cat out of the bag").

5517 THE EXCLUSIONARY RULE

A. The General Rule of Exclusion. Under Article 31(d), "No statement obtained in violation of this article ... may be received in evidence against him in a trial by court-martial." Similarly, M.R.E. 304(a) provides that "an involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion ... or an objection"

B. Statements Incriminating Others. United States v. McCoy, 31 M.J. 323 (C.M.A. 1990)(Exclusionary rule does not apply to coerced or unadvised witness statements that incriminate someone else. ... Evidence of coercive or illegal investigatory tactics employed by the Government to secure such evidence or subsequent testimony based thereon may be presented to the factfinder for purposes of determining the weight to be afforded this evidence." No due process violation where trial counsel deliberately advised CID agents not to advise suspects of their Article 31 rights and suspects later gave immunized testimony against accused where accused had a full opportunity to present this improper conduct to the members through cross-examination, witnesses, and argument).

5518 CORROBORATION. United States v. Rounds, 30 M.J. 76 (C.M.A. 1990), cert. denied, 111 S.Ct. 130 (1990)("Independent evidence of each and every element of the confessed offense is not required as a matter of military law. All that is required is that the independent evidence raise an inference of truth as to the essential facts stated in the confession. Generally speaking, it must establish the trustworthiness of the confession." Confession was sufficiently corroborated without independent evidence of ingestion of drugs when independent evidence showed accused had access and opportunity to ingest drugs at time and place where he confessed to using drugs).

SPEEDY TRIAL

5519 **THE 120-DAY RULE.** Under R.C.M. 707, the trial must begin within 120 days after clock starts. [R.C.M. 707(a)] Ten day extensions can be granted by the MJ for extraordinary circumstances. This 120-day rule applies to all cases, including those where the accused is initially placed in pretrial confinement or arrest. Government accountability begins upon the earlier of the following events:

A. Pretrial Restraint under R.C.M. 304(a)(2)-(4). [Note: after 1 March 1986, conditions on liberty no longer "triggered" speedy trial clock.] United States v. Bradford, 25 M.J. 181 (C.M.A. 1987)(Placement on liberty risk did not start speedy trial clock where the primary purpose for the limitation of the accused's liberty was not to ensure his presence at trial); United States v. Wilkes, 27 M.J. 571 (N.M.C.M.R. 1988)(Accused denied speedy trial where CO changed restriction to liberty risk because of the "legal ramifications"; trial on day 125); United States v. Brunton, 24 M.J. 566 (N.M.C.M.R. 1987)(Involuntary extension beyond EAOS is not restraint under R.C.M. 707); United States v. Poole, 30 M.J. 149 (C.M.A. 1990)(Dicta that unreasonable extension beyond EAOS may be prejudicial to accused and have speedy trial implications); United States v. McCallister, 24 M.J. 881 (A.C.M.R. 1987), aff'd on other grounds, 27 M.J. 138 (C.M.A. 1988)(Civilian confinement at the request of the military starts the clock); United States v. Cummings, 21 M.J. 987 (N.M.C.M.R. 1986), pet. den., 22 M.J. 242 (C.M.A. 1986)(When accused held by civilians for military and civil charges, clock starts when military informed accused is immediately available for transfer).

B. Notice to accused of preferral of charges. United States v. Maresca, 28 M.J. 328 (C.M.A. 1989)(Clock started when the accused could have been notified under R.C.M. 308, even if not notified; here, day of preferral); United States v. Leamer, 29 M.J. 616 (C.G.C.M.R. 1989)(Clock started on day after TAD command received the charges in the mail; clock not started by accused's noticing the charge sheet in the XO's in-basket).

5520 **COUNTING.** Under R.C.M. 707(b), exclude the date of notice of preferral or imposition of pretrial restraint; include date of trial. When multiple charges are preferred at different times, the inception for each shall be determined from the date on which the accused was notified of preferral or on which restraint was imposed on the basis of that offense. United States v. Robinson, 28 M.J. 481 (C.M.A. 1989)(Pretrial confinement only triggered the clock for the offense for which it was imposed). When cases are reversed on appeal and a rehearing is ordered, the 120-day clock commences when the convening authority, not the accused, is notified of the C.M.R. decision. United States v. Moreno, 24 M.J. 752 (A.C.M.R. 1987). The clock is stopped by entry of guilty plea or presentation of evidence on merits.

5521 **RESETTING THE CLOCK.** If charges are dismissed, if a mistrial is granted, or, when no charges are pending, if the accused is released from pretrial restraint for a significant period, the time under R.C.M. 707 runs only from the date on which charges or restraint are reinstituted.

A. Dismissal. United States v. Britton, 26 M.J. 24 (C.M.A. 1988)(Withdrawal of charges by CA not equivalent to dismissal under 707(b)(2); speedy trial clock not reset upon same-day preferral of same charges); United States v. Mickla, 29 M.J. 749 (A.F.C.M.R. 1989)("Dismissal" means that no further action against the accused is contemplated; not dismissal with a view toward amendment); United States v. Mutchinson, 28 M.J. 1113 (N.M.C.M.R. 1989)(Factors for determining if withdrawal amounts to dismissal); United States v. Lorenc, 30 M.J. 619 (N.M.C.M.R. 1990), pet. den., 32 M.J. 1 (C.M.A. 1990)(Mutchison distinguished).

B. Release for a Significant Period. United States v. Gray, 26 M.J. 16 (C.M.A. 1988)(Despite 24 days in pretrial confinement, charges were not "pending" until preferred; 34 days was a "significant period"); United States v. Ramsey, NMCM 88 1228 (N.M.C.M.R. 9 Sep 88) (Two days held to be "significant period"); Andrews v. Heupel, 29 M.J. 743 (A.F.C.M.R. 1989)(Clock is not reset when the accused has already been denied a speedy trial (212 days restriction) at the time of his release); United States v. Hulse, 21 M.J. 717 (A.F.C.M.R. 1985)(5 days held to be significant period); United States v. Miller, 26 M.J. 959 (A.C.M.R.), pet. den., 28 M.J. 164 (C.M.A. 1989)(5 days in administrative restriction in psychiatric ward for attempting suicide not time attributable to the government and held to be significant period); United States v. Wilkinson, 27 M.J. 645 (A.C.M.R. 1988), pet. den., 28 M.J. 230 (C.M.A. 1989)(50-day period of "no pass privileges" held to be a significant period); United States v. Campbell, 32 M.J. 564 (A.C.M.R. 1991) (Restriction imposed at NJP equated to release from pretrial restraint); United States v. Callinan, 32 M.J. 701 (A.F.C.M.R. 1991); (Clock tolled when CO lifted restriction despite requirement for accused to remain away from victim); United States v. Smith, 32 M.J. 586 (A.C.M.R. 1991)(Clock reset to zero where accused broke restriction to go UA).

5522 **EXCLUDED PERIODS.** Though not exhaustive, the following paragraphs discuss cases examining the frequently encountered excluded periods under R.C.M. 707(c).

A. Examinations of accused's mental capacity or responsibility or capacity to stand trial. United States v. Mahoney, 28 M.J. 865 (A.F.C.M.R. 1989)(Standard is not whether it could have been done quicker, but whether the time which was taken was reasonable; 68 days was reasonable here); United States v. Pettaway, 24 M.J. 589 (N.M.C.M.R. 1987)(Irrelevant whether requested by the defense or by the government); United States v. Calloway, 23 M.J. 799 (N.M.C.M.R. 1986); United States v. Palumbo, 24 M.J. 512 (A.F.C.M.R. 1987); United States v. Demmer, 24 M.J. 731 (A.C.M.R. 1987).

B. Pretrial motion sessions and other proceedings. United States v. Pettaway, 24 M.J. 589 (N.M.C.M.R. 1987)(MJ properly excluded 12 days spent during motion practice, without regard to the number of days actually spent in court); Porter v. Eggers, 32 M.J. 583 (A.C.M.R. 1990)(Delay while accused contested jurisdiction of foreign court was attributable to defense).

C. Meritorious appeals under R.C.M. 908 or other petitions for extraordinary relief made in good faith. United States v. Ramsey, 28 M.J. 370 (C.M.A. 1989)(The time taken by the appeal and, by implication, the 72 hours allowed by R.C.M. 908 to determine whether to seek appellate relief are excludable); United States v. Solorio, 29 M.J. 510 (C.G.C.M.R. 1989)(Time for accused to appeal to CMA was excluded as defense delay).

D. Delay or continuance granted at request of, or with consent of, defense. Acquiescence, or even request for a particular trial date, is not the same as a request for a continuance in writing or on the record. Only the latter is excludable delay. United States v. Burris, 21 M.J. 140 (C.M.A. 1985)(DC request for trial date beyond 120-day mark was not a continuance request; may be estopped if bad faith shown); United States v. Carlisle, 25 M.J. 426 (C.M.A. 1986)("[E]ach day that an accused is available for trial is chargeable to the Government, unless delay has been approved by either the convening authority or the military judge, in writing or on the record"; time spent in PTA negotiations is not charged to the defense absent express request for delay); United States v. Givens, 30 M.J. 294 (C.M.A. 1990)(Language in Carlisle is precatory in nature; did not intend to create per se rule); United States v. Kohl, 26 M.J. 919 (N.M.C.M.R. 1988)(Applied Carlisle to PTC); United States v. Cook, 27 M.J. 212 (C.M.A. 1988)(Delay resulting from DC request for production of witnesses at Article 32 was not chargeable to defense); United States v. Brodin, 25 M.J. 580 (A.C.M.R. 1987)(Delay in getting sworn statements from unavailable witnesses resulting from DC objection at Article 32 was not excludable as defense delay); United States v. Schilf, 1 M.J. 251, 253 (C.M.A. 1976)(Recommended all requests for delay after referral, together with the reasons therefor, be acted upon by the trial judge, rather than be the subject of negotiation and agreement between opposing counsel); United States v. Raichle, 28 M.J. 876 (A.F.C.M.R. 1989)(Time required to conduct defense requested depositions of "unavailable" witnesses attributable to the government); United States v. Wactor, 30 M.J. 821 (A.C.M.R. 1990)(DC's acquiescence to delay does not relieve government of its burden); United States v. King, 30 M.J. 59 (C.M.A. 1990)(Accused cannot be responsible for or agreeable to delay and then turn around and demand dismissal); United States v. McKnight, 30 M.J. 205 (C.M.A.), cert. denied, 111 S.Ct. 350 (1990)(Defense has some responsibility to cooperate in scheduling when delay granted for its convenience); United States v. Reincke, 32 M.J. 63 (C.M.A. 1990)(TC delayed 3 months in providing court ordered expert to assist defense; DC's failure to object waived right to contest timeliness); United States v. Smith, 32 M.J. 586 (A.C.M.R. 1991)(24-day delay to process defense's offer for PTA held reasonable because of DC's open-ended written request for delay while CA considered it).

E. Article 32 delay or TC requested trial continuance if resulting from nonavailability of substantial, relevant, and necessary evidence diligently sought which will become available within a reasonable time; or TC needs more preparation time, and delay justified because of exceptional circumstances. United States v. Maresca, 28 M.J. 328 (C.M.A. 1989)(Rota MJ properly excluded 14 days because two key government witnesses were unavailable for trial; one was TAD on a mission-essential assignment, the other was a Spanish national in England for a course that could not be rescheduled).

F. Absence or nonavailability of accused. United States v. Turk, 24 M.J. 277 (C.M.A. 1987)(MJ properly excluded 24 delay between accused's surrender and return to deployed ship); United States v. McCallister, 24 M.J. 881 (A.C.M.R. 1987), aff'd on other grounds, 27 M.J. 138 (C.M.A. 1988)(When an accused is initially confined by civilians at request of the government, a reasonable time to return the accused to his command is excluded); United States v. Lilly, 22 M.J. 620 (N.M.C.M.R. 1986)(Government allowed actual time of UA plus reasonable time to transfer accused to the command); United States v. Brown, 30 M.J. 839 (N.M.C.M.R. 1990)(2-month period from when ship deployed with recently returned absentee to repreferal and notification of charges not attributable to government); United States v. Bragg, 30 M.J. 1147 (A.F.C.M.R. 1990), pet. den., __ M.J. __ (C.M.A. 1991)(When accused held by civilians for civil and military offenses, time not attributable to the government if the accused is not available for transfer back to military and not held at behest of military).

G. Delay resulting from good cause including unusual operating requirements and military exigencies. United States v. Kuelker, 20 M.J. 715 (N.M.C.M.R. 1985)(Delay in obtaining essential evidence from U.S. Treasury Department did not constitute delay for good cause; requires extraordinary situation rather than normal difficulties encountered in preparing for trial); United States v. Higgins, 27 M.J. 150 (C.M.A. 1988)(Delay of 108 days caused by processing of vain resignation request outside of the local command was excludable as delay for good cause, given absence of any allegation or show of dilatory tactics); United States v. Facey, 26 M.J. 421 (C.M.A. 1988)(Delay to await trial of a material government witness who would be immunized "should usually be treated as 'good cause' for purposes of R.C.M. 707(c)(8)." United States v. Ruhling, 28 M.J. 586 (N.M.C.M.R. 1988). (Nine day delay to get defense witnesses and documents onboard ship considered "good cause" under R.C.M. 707(c)(9); no Burton analysis); United States v. Camacho, 30 M.J. 644 (N.M.C.M.R. 1990)(6-day emergency leave for Art. 32 IO to attend father's funeral held to be good cause); Hall v. Thwing, 30 M.J. 583 (A.C.M.R. 1990)(Government's failure to process case for 171 days while awaiting Germany's release of jurisdiction found unreasonable).

5523 **PRETRIAL CONFINEMENT UNDER R.C.M. 707(d).** Immediate steps must be taken to bring a confined accused to trial. No accused shall be held in pretrial arrest or confinement over 90 days. Except for

R.C.M. 707(c)(7)[joint trials], all time excluded under R.C.M. 707(c) shall be excluded in computing when 90 days has run.

5524 **THE BURTON RULE.** In United States v. Burton, 44 C.M.R. 166 (C.M.A. 1971), C.M.A. examined the Article 10 right to a speedy trial and created a presumption of prejudice when the accused has been in pretrial confinement more than 90 unexcused days. Unless the government meets a heavy burden to show that it exercised due diligence, the charges will be dismissed. The Burton rule applies only to pretrial confinement or other restraints amounting to confinement. United States v. Schilf, 1 M.J. 251 (C.M.A. 1976) (The 90-day rule applies if the MJ rules that restraint was tantamount to confinement). Though pre-R.C.M. 707, Burton lives. United States v. Harvey, 23 M.J. 280 (C.M.A. 1986). The discussion to R.C.M. 707(d) indicates that Burton is still the best guidance in cases of PTC because R.C.M. 707(d) permits exclusion of certain periods that Burton does not. Therefore, compliance by the government with R.C.M. 707(d) still could result in dismissal under Burton.

A. **The Second Prong.** Burton also held that when the defense requests a speedy disposition of the charges, the government must respond to the request and either proceed immediately or show adequate cause for any further delay. This so-called second prong of Burton, traceable to the Supreme Court's decision in Barker v. Wingo, 92 S. Ct. 2182 (1972), still exists but lacks vitality. Burton no longer requires the government to respond to the request and either proceed to trial immediately or show adequate cause for further delay. United States v. McCallister, 27 M.J. 138 (C.M.A. 1988).

B. **Showing Diligence.** In United States v. Marshall, 47 C.M.R. 409 (C.M.A. 1973), C.M.A. held that "mere diligence would not be sufficient to overcome the Burton presumption. Extraordinary circumstances, other than normal problems such as mistakes in drafting, manpower shortages, illness and leave, are required. The government may still show diligence in such cases as those involving problems found in a war zone or in a foreign country, or those involving serious or complex offenses in which due care requires more time or for reasons beyond the control of the prosecution.

C. **Counting.** Count the day of trial or release but not the first day of confinement. United States v. Manalo, 1 M.J. 452 (C.M.A. 1976). Government accountability for additional charges begins when the government has in its possession substantial information on which to base preferral of charges. United States v. Johnson, 48 C.M.R. 599 (1974). In contrast to R.C.M. 707 practice, when the accused is in the hands of civil authorities, the government has a reasonable period of time to transport the accused before the Burton 90-day clock starts. United States v. Halderman, 47 C.M.R. 871 (N.C.M.R. 1973); United States v. Smith, 50 C.M.R. 237 (A.C.M.R. 1975). When the accused is released from pretrial confinement

before 90th day, accountability switches to the 120-day clock under R.C.M. 707(a). Entry of pleas or presentation of evidence on the merits will stop the clock.

D. Excluded Periods. Time not chargeable to government under Burton includes continuances and mental responsibility evaluations requested by the defense. Burton, supra; United States v. McClain, 1 M.J. 60 (C.M.A. 1975). The statutory waiting period between service of charges and trial will be excluded when the defense is prepared to proceed but refuses to waive the right. United States v. Cherok, 22 M.J. 483 (C.M.A. 1986).

5525 **LITIGATING THE SPEEDY TRIAL ISSUE.** The issue is raised as a motion to dismiss by the defense generally before entry of pleas. To preserve the issue for appeal, it must be raised before adjournment. R.C.M. 907(b)(2). Generally, failure to make a timely motion constitutes waiver but C.M.R. has discretion to entertain the motion first raised on appeal. United States v. Britton, 26 M.J. 24 (C.M.A. 1988). If raised, a guilty plea does not waive the speedy trial issue. United States v. Angel, 28 M.J. 600 (N.M.C.M.R. 1989). Per R.C.M. 905(c), the standard of proof is preponderance of the evidence; the burden of persuasion is on the government.

CHAPTER 56**RECURRING TRIAL ISSUES****CHILD ABUSE CASES**

5601 **INTRODUCTION TO CHILD ABUSE CASES.** Our military justice system is not geared to accommodate court proceedings involving child victims. Children are not little "big people." They are unique in their response to trauma, fright, guilt, shame, and the accompanying range of emotions. These cases present challenging issues for the judge advocate. Can the child be protected without compromising the rights of the alleged perpetrator? Is a child witness credible? Competent? Should a child victim's hearsay statement be admitted under the residual hearsay exception. Effective prosecution and defense of child sexual abuse cases requires specialized knowledge and training. This unique area requires an understanding of medicine, psychology, investigatory techniques, and a firm grasp of the rules of evidence. A multidisciplinary approach to these cases is a must. Education and training are prerequisites to proper sensitization and resolution of these complex issues. This section highlights some of the recent decisions and legislation which will affect practitioners.

5602 **COMPETENCE OF THE CHILD WITNESS TO TESTIFY.** See NJS "Evidentiary Foundations" for guidance on laying a proper foundation. United States v. Morgan, 31 M.J. 43 (C.M.A. 1990)(Nonverbal responses by 4 year old witness to the TC's traditional truthfulness inquiry established that the witness knew the difference between truth and falsehood and intended to tell the truth). Ensure the court reporter reflects the gestures in the record.

5603 **CONFRONTATION**

A. **At the Article 32 Investigation.** In United States v. Bramel, 29 M. J. 958 (A.C.M.R. 1990), aff'd, 32 M.J. 3 (C.M.A. 1990), the child victim testified behind a partition at the Article 32 investigation, unaware that the accused was present. The accused could hear but not see the victim; the defense counsel cross-examined. The child testified at the court-martial without the partition. The court held the right to face-to-face confrontation is a trial right; Article 32(b), UCMJ, only provides for the right of cross-examination, not confrontation. The Article 32 investigation is not a critical stage of the trial. Rather, its primary function is for discovery and to provide an impartial recommendation.

B. **At Trial**

1. **Supreme Court.** In Maryland v. Craig, 110 S. Ct. 3157 (1990), a child victim testified by one-way closed circuit television with a defense counsel

and a prosecutor present. The testimony was seen in the courtroom by the accused, jury, judge, and other counsel. The Supreme Court concluded "that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Id.* at 3167. The Court opined that face-to-face confrontation with an available witness was required unless the state can make a case-specific showing of necessity because the child will suffer emotional distress if forced to testify in the presence of the accused, and the witness' ability to communicate will be impaired. If the se-specific showing is made then the accused's sixth amendment confrontation rights are protected by cross-examination under oath observed by judge, jury, and the accused.

2. Court of Military Appeals. United States v. Thompson, 31 M.J. 168 (C.M.A. 1990)(Accused's due process rights were not violated when the two sons he was accused of abusing testified in the courtroom with their backs to the accused father). Per Thompson, the military judge must establish by a specific inquiry and case specific findings that literal confrontation will cause such emotional trauma that the child cannot reasonably communicate information to the trier of fact. Judge Everett, in a concurring opinion, emphasized that the procedure used in this judge alone case created no adverse inference to the presumption of innocence and was so stated on the record. In a footnote, Judge Everett warned that in a members trial it will be important for a MJ to consider the risk that the members may infer guilt because of the location of the child witness during their testimony. The MJ should be careful to preclude such an inference by giving appropriate instructions. United States v. Batten, 31 M.J. 205 (C.M.A. 1990)(Conviction upheld where victim, age 3, was separated from accused by a partition; accused observed testimony by video camera); United States v. Romey, 32 M.J. 180 (C.M.A. 1991)(Confrontation requirement satisfied where child victim whispered testimony to her mother who then repeated it to the court under oath as an interpreter).

5604 **UNAVAILABLE CHILDREN.** In many child abuse cases, a child makes a statement or testifies at a pretrial hearing but is unavailable at trial, thereby presenting the question of whether the child is "unavailable" under the confrontation clause of the sixth amendment. C.M.A. has opined that the sixth amendment requirement "for establishing 'unavailability' may be even more stringent than that imposed by M.R.E. 804." United States v. Burns, 27 M.J. 92, 96 (C.M.A. 1988)(No attempt to personally deliver a subpoena to the critical, but incredible victim). Per R.C.M. 703, formal service is "advisable" when the witness' voluntary attendance is unlikely. "A military judge is hardly bound to accept a mother's unprofessional, lay opinion that requiring a child to testify at trial would so traumatize the child as to outweigh an accused's right to confrontation under the Sixth Amendment." United States v. Ferdinand, 29 M.J. 164, 168 (C.M.A. 1989), cert. denied, 110 S.Ct. 840 (1990). Consider Articles 47 and 48, UCMJ, enforcement and contempt proceedings, and do not presume efforts would be futile merely because witness threatens to disobey a subpoena. The Government's diligence in attempting

to secure the witness' presence goes a long way toward a showing of unavailability. United States v. Evans, 31 M.J. 927 (A.C.M.R. 1990)(Civilian witness living in the U.S., court-martial in Germany; witness not subject to subpoena; SJA representative in Germany spoke with witness who said he would decline invitational travel orders (ITO) even if expenses paid; witness told wife the same; and witness refused to accept ITO from SJA representative in U.S.). Watch for the Supreme Court's decision in White v. Illinois, 555 N.E.2d 1241 (Ill. 1990). The Court granted certiorari on the issue of whether the child victim must be "unavailable" for out-of-court statements to be admissible as hearsay exceptions and not violate the confrontation clause.

5605 **INDICIA OF RELIABILITY.** Even if a child witness is deemed unavailable, the out-of-court statement is inadmissible unless there are sufficient "indicia of reliability."

A. **Supreme Court.** In Idaho v. Wright, 110 S. Ct. 3139 (1990), a statement by 2 1/2 year-old girl to a pediatrician was admitted under the residual hearsay exception. While the unavailability of the witness was not at issue, the Court held her out-of-court statement lacked sufficient indicia of reliability. The Court articulated factors to consider in determining whether a hearsay statement made by a child witness in a child sexual abuse case has sufficient indicia of reliability to satisfy the confrontation clause: Spontaneity and consistent repetition; mental state of the declarant; use of terminology unexpected of a child of similar age; and lack of motive to fabricate. The Court rejected boot-strapping by using corroborating factors like physical evidence; consistency among witnesses' statements; and consistency with the accused's confession. Look at factors which relate to whether the witness was likely to be telling the truth at the time the statement was made, i.e., the totality of the circumstances surrounding the making of the statement.

B. **Military Precedent.** United States v. Moreno, 31 M.J. 935 (A.C.M.R. 1990). Child victim made an accusatory videotaped statement to a social worker and a statement recanting the accusations at a deposition. Defense was present but did not cross-examine the child at the deposition. ACMR stated that Wright was controlling. The court further held that the accused waived his right to confrontation at the deposition and the statements were sufficiently reliable to be admissible.

5606 **INCREDIBLE CHILD WITNESS.** United States v. Smith, 31 M.J. 823, 825 (A.C.M.R. 1990)("In view of evidence of coaching, the history of physical abuse by the mother, the absence of any corroboration as to the cause of the fracture, the testimony of an orthopedic expert that the fracture could have been caused by a fall, and the unreliability of the victim's memory of the alleged assault, we find the evidence insufficient to support the finding of guilty").

5607 **HEARSAY RULE AND THE MEDICAL TREATMENT EXCEPTION.** United States v. Edens, 31 M.J. 267 (C.M.A. 1990)(Proponent of

statements under M.R.E. 803(4) must show the statements were offered for diagnosis or treatment and the patient realized the benefit); United States v. Avila, 27 M.J. 62 (C.M.A. 1988)(Though very young children will not have the same understanding or incentive as adults when making statements to health care providers, the child must know that the person is rendering care and needs the information to help for the statements to be admissible).

5608 **UNCHARGED MISCONDUCT.** Evidence of uncharged misconduct is admissible in child sexual abuse cases but seemingly not to the same extent as would be permitted under M.R.E. 404b in other cases. In United States v. Munoz, 32 M.J. 359 (C.M.A. 1991), C.M.A. opined that this evidence is admissible to prove modus operandi when the accused acknowledges the acts occurred, but not by him. Similarly, uncharged misconduct would be admissible to show intent or rebut mistake of fact when the accused acknowledges acts occurred but relies on such a theory of defense. United States v. Orsburn, 31 M.J. 182 (C.M.A. 1990)(Explicit books dealing with sex with children were admissible where found in accused's home in proximity to alleged sexual offenses committed by accused with his daughter and offered to show that the accused had the requisite sexual desire relevant to the LIOs of indecent assault and indecent acts on a child). When the accused flatly denies anything occurred, the evidence simply shows the accused acted in conformity with an earlier occasion and is inadmissible under M.R.E. 404. The TC in Munoz won the motion in limine regarding introduction of uncharged misconduct but exceeded the scope of that victory. Interestingly, the court there upheld the introduction of uncharged misconduct which occurred 15 YEARS earlier, reasoning that the similarity was demonstrated by the age of the victims, not the time elapsed.

5609 **EXPERT TESTIMONY.** An expert may testify to help the trier of fact understand the evidence to determine a fact in issue. Qualified experts may also identify symptoms found among children who have suffered sexual abuse and state whether the child-victim has exhibited these symptoms. Further an expert may discuss various patterns of consistency in the stories of child sexual abuse victims and evaluate patterns in the victim's story. United States v. Holt, 31 M.J. 758 (A.C.M.R. 1990)(Upheld admissibility of board certified pediatrician's opinion that the victim had been sodomized and social worker's opinion that the victim demonstrated damaged goods syndrome). The expert may not, however, invade the province of the factfinders to weigh the evidence and determine credibility, i.e., put the expert's stamp of truthfulness on the witness's story. United States v. Harrison, 31 M.J. 330 (C.M.A. 1990)(Conviction overturned where clinical psychologist testified that the accused's stepdaughter was a credible and reliable witness and that she had been sexually abused). See also the article written by Professor John E.B. Meyers, Ass. Professor of Law, Univ. of Pacific, McGeorge School of Law in "Off the Record," Number 116.

5610 **AGGRAVATION.** United States v. Button, 31 M.J. 897 (A.F.C.M.R. 1990)(Accused's continual flouting of his commander's order not to go to

his family's on base quarters where alleged victim of sexual abuse resided was proper evidence in aggravation under RCM 1001(b)(4)).

5611 **VICTIMS OF CHILD ABUSE ACT OF 1990.** Legislative developments in the area of child abuse recently culminated in the enactment of the "Child Victims' Rights Act." The Act, passed as part of Title II of the 1990 Omnibus Crime Control Act, Pub. L. No. 101-647, reflects growing national awareness of and concern about child abuse. The Act contains sweeping changes to the Federal criminal code provisions dealing with offenses against children, including a liberalization of the rules regarding the use of videotaped testimony, tightening of reporting requirements onboard Federal lands and facilities, and increased penalties provisions. While many of the provisions deal with the particulars of prosecuting Federal offenses, a number of the provisions directly affect the way the Navy conducts business onboard its installations.

A. Of particular interest are the child abuse reporting provisions. Under the Act, health care providers, social workers, teachers, law enforcement personnel, day care providers, and commercial film processors engaged in their official duties on Federal land or a federally owned (or contracted) facility are required to report immediately all incidents of suspected child abuse to a special agency to be designated by the Attorney General. To promote compliance with this provision, the Act provides immunity for good faith reporting and a criminal penalty for failure to report. The statute also mandates periodic training for covered individuals to promote awareness of the reporting requirement and to identify abused and neglected children. Additionally, background checks prior to hiring individuals involved with the provision of child care services in a federally operated facility are required. (This includes facilities operated under contract.)

B. The Act highlights legislative efforts to protect children. Specific provisions include: the taking of child victims' testimony by two-way, closed-circuit television; the expanded statute of limitations for the prosecution of offenses against children; and the new provisions for increased penalties for crimes involving sexual abuse, kidnapping, and the distribution of material involving children engaged in sexually explicit conduct. The Act will doubtless shape the development of military jurisprudence in this area.

FRATERNIZATION

5612 **FRATERNIZATION REFERENCES**

- A. Article 1165, U.S. Navy Regulations, 1990
- B. Part IV, para. 83, MCM, 1984

C. OPNAVINST 5370.2

D. Marine Corps Manual, para. 1100.4

5613 **INTRODUCTION.** Fraternization is now a listed offense at Part IV, para. 83, MCM, 1984, and is charged under article 134. Fraternization may also be charged under article 92 as a violation of Art. 1165, U.S. Navy Regulations, 1990 or under article 133. The maximum punishment is two years' confinement, total forfeitures, and a DD/dismissal.

5614 **DESCRIPTION.** Fraternization is better described than defined. Still, some have tried as follows:

A. U.S. Navy Regulations, 1990. Article 1165 defines fraternization as: Personal relationships between officer and enlisted members which are unduly familiar and do not respect differences in rank.

1. Such relationships are inappropriate and violate long-standing traditions of the naval service.

2. When prejudicial to good order and discipline or of a nature to bring discredit on the naval service, personal relationships are prohibited:

a. Between an officer and an enlisted member which are unduly familiar and do not respect differences in rank and grade; or

b. between officer members or enlisted members which are unduly familiar and do not respect differences in rank and grade where a direct senior-subordinate supervisory relationship exists.

B. CNO Policy. OPNAVINST 5370.2, page 2, para. 4, defines fraternization as: ... Personal relationships which contravene the customary bounds of acceptable senior-subordinate relationships. Although it has most commonly been applied to officer-enlisted relationships, fraternization also includes improper relationships between officer members and between enlisted personnel.

C. Marine Corps Policy

1. Paragraph 1100.4 of the Marine Corps Manual provides as follows:

Relations Between Officers and Enlisted Marines. Duty relationships and social and business contacts among Marines of different grades will be consistent with traditional standards of good order and discipline and the mutual respect that has always existed between Marines of senior grade and those of lesser grade. Situations that invite or give the

appearance of familiarity or undue informality among Marines of different grades will be avoided or, if found to exist, corrected. . . . [These provisions] apply generally to the relationships of noncommissioned officers with their subordinates and apply specifically to noncommissioned officers who may be exercising command authority.

2. As noted above, Article 1165, U.S. Navy Regulations, prohibits officer-officer and enlisted-enlisted fraternization only when a direct senior-subordinate relationship exists. CMC has submitted a proposed change that, if adopted, would prohibit fraternization between members of different grades when the circumstances of the relationship are such as to impair good order and discipline or bring discredit upon the Service.

D. Manual for Courts-Martial. Part IV, paragraph 83c makes no attempt to define fraternization. It expressly adopts the "acts and circumstances" language of Free below and describes the offensive acts as those which are in "violation of the custom of the armed forces against fraternization."

E. Judicial Attempts

1. In Free at 470, [full citations appear at the end of this section] the Navy Board first enunciated the difficulty in defining fraternization:

Because of the many situations which might arise, it would be a practical impossibility to lay down a measuring rod of particularities to determine in advance what acts are prejudicial to good order and discipline and what are not. [T]he surrounding circumstances have more to do with making the act prejudicial than the act itself in many cases. [E]ach case must be determined on its own merits. Where it is shown that the acts and circumstances are such as to lead a reasonably prudent person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by the compromising of an enlisted person's respect for the integrity and gentlemanly obligations of an officer, there has been an offense under Article 134.

2. Baker describes fraternization as "untoward association that demeans the officer, detracts from the respect and regard for authority in the military relationship between officers and enlisted and seriously compromises the officer's standing as such." Baker cites with approval Tedder and the Marine Corps Manual, para. 1100.4 explanations of fraternization.

3. Van Steenwyk contains an excellent historical analysis of the concept of fraternization. In discussing whether an officer's sharing of marijuana with enlisted personnel and having sexual relations with female members of his staff constituted wrongful fraternization, the Navy court says in footnote 12: "Fraternization ... in civilian usage means associating in a brotherly manner; being on friendly terms. The military usage of the term is very similar. [F]raternization refers to a military superior-subordinate relationship in which mutual respect of grade is ignored."

4. The Court of Military Appeals in Mayfield defined fraternization as "any nonprofessional, social relationship of a personal nature between two or more persons." Included in this definition are relationships between permanent personnel and trainees, NCO's (E-5 and above) and junior enlisted personnel, or officer and enlisted personnel of all grades. Suggestive (but not exhaustive) of the types of conduct addressed by the term fraternization are: drinking alcoholic beverages together, playing cards or gambling together, going to private homes or clubs together, and dating or engaging in sexual activities.

F. Defining by Example. Therefore, it is not every interaction between officers and enlisted that is wrongful. Tedder (Officer having a drink with enlisted woman not fraternization); Johanns; Wales; Arthen; Cottrell (Private, nondeviate, voluntary sexual relations between Air Force officer and enlisted member not fraternization where there is no command or supervisory relationship and no discernible custom against fraternization); Moultak (officer-enlisted sexual relations and financial dealings are conduct unbecoming an officer under article 133); Mayfield (asking enlisted woman on a date and fondling an enlisted woman is fraternization); Parrillo (supervisor who fraternizes sexually with someone under his command violates article 133). The key issue is whether the interaction or relationship has become "over-familiar" or created the appearance of favoritism or partiality.

5615 **ELEMENTS UNDER ARTICLE 134, UCMJ.** Part IV, para. 83b, MCM, 1984, lists five elements under fraternization: The accused was a commissioned or warrant officer; the accused fraternized on terms of military equality with one or more enlisted members in a certain manner; the accused then knew the person to be an enlisted member; such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

A. Officer and Enlisted Offenders. Historically, the prohibition against fraternization applied only to relations between officers and enlisted and was based on social distinctions. Stocken. While not specifically provided for in paragraph 83, the analysis of that paragraph indicates that this article 134 offense does not preempt the creation of an order or a novel 134 specification to punish the enlisted participant.

Carter; March. Novel charges under article 134 to punish the enlisted participant should no longer be required, however, with the new prohibition set out in Article 1165 of U.S. Navy Regulations, 1990. Warrant officers (WO-1) are included as accused despite the fact that, elsewhere in the UCMJ, they are treated as enlisted members. Part IV, para. 15a, MCM, 1984. A midshipman might best be charged under article 133, since this first element seems to exclude them. Part IV, para. 59c(1), MCM, 1984.

B. Fraternalized on Terms of Military Equality.

1. This element suggests that not every meeting between officers and enlisted is wrongful. Tedder; Smith; Johanns. However, this article does not require that a command or supervisory relationship exist between the officer and enlisted person. The Navy court, in Van Steenwyk said that the damage done by fraternization does not depend on the chain of command, but on the compromise of position; "today's lovers of different commands are tomorrow's senior and subordinate."

2. The conduct prohibited need not be sexual in nature, although it often is. Livingston (Drinking liquor with enlisted men and sodomy); Lovejoy (Sodomy); Hoard (Socializing, drinking, and sexual intercourse); Nelson (Soliciting a male soldier to arrange social engagements with enlisted women); Adames (Attending private enlisted party); Mayfield (Asking enlisted woman for dates); Van Steenwyk (Using marijuana with enlisted personnel).

C. Knowledge. It would appear to be a general defense that the accused honestly did not know the person's enlisted status. The government must show actual knowledge beyond a reasonable doubt.

D. Custom of the Accused's Service.

1. The existence of a custom proscribing the alleged conduct also provides the notice of criminal sanction required by due process. Johanns; Moultak; Van Steenwyk; Wales; Arthen; Cottrell. Recent N.M.C.M.R. cases have uniformly held that any reasonable officer of even minimal intelligence is deemed to be on notice that officers cannot associate with enlisted personnel on terms of military equality in the naval service. In Van Steenwyk, N.M.C.M.R. described a "judicially recognizable custom" against sexual relations with enlisted personnel.

2. The prosecution, however, must prove the existence of a service custom which makes the alleged conduct wrongful. "Custom" is defined at Part IV, paragraph 60c(2)(b), MCM, 1984. It is the existence of a custom that makes certain conduct between officers and enlisted wrongful. Absent the existence of the service-wide custom, the conduct is not unlawful. Wilson; Means; Johanns; Wales; Arthen; Cottrell. The government may rely on written documents such as the Marine Corps

PROCEDURES FOR VACATION OF SUSPENDED SENTENCES

COURT-MARTIAL SENTENCE	ANY GCM, BCD SPCM	NON-BCD SPCM, SCM
HEARING REQUIRED	Similar to Article 32, UCMJ, investigation. Use DD Form 455.	
RIGHT TO COUNSEL	Same as at GCM. No right to IMC	Same as at type of C-M which adjudged the sentence. No right to IMC
WHO VACATES	GCMA	SPCMA, SCMCA
REQUIRED RECORD	Written statement of evidence and reasons for vacating	

**GENERAL COURT-MARTIAL PUNISHMENT CHART
(CONTINUED)**

PERMISSIBLE PUNISHMENTS	Enlisted	Warrant O's	Officers
Reduction	YES, TO E-1	NO	NO
Loss of Numbers	NO	YES	YES
Reprimand	YES	YES	YES

Manual, para. 1100.4; NAVMC 2767 of 12 March 1984 "User's Guide to Marine Corps Leadership Training"; OPNAVINST 5370.2; or U.S. Navy Regulations, 1990 (article 1165) to prove a custom. Where there is no written policy available, custom may be proven through testimony. Free (Officer with 31 years of service testified as to the custom against officer-enlisted sexual relations). The courts, however, have repeatedly warned that customs should be reduced to writing or they may be unable to discern the custom and may not uphold alleged violations. Pitasi at 38. "A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been long abandoned." Johanns at 159; Wales.

3. The existence of such an order or regulation would eliminate the need to prove custom was violated and allow the offense to be charged under article 92. Hoard; Carter; Adams (Army regulation precludes student-instructor fraternization) Such codifications of custom in the form of regulations is also encouraged by the MCM. Part IV, para. 83c(2), MCM, 1984, specifically suggests that officer-enlisted relations may be governed by orders. The analysis at Appendix 21, para. 83, states that there would be no preemption issue raised with a fraternization prosecution under article 92. Multiplicity would still have to be considered. Cantu. Navy custom is now codified in Article 1165, U.S. Navy Regulations, 1990 and OPNAVINST 5370.2.

4. In Lowery, the Army court opined that the custom against fraternization was created for all of the services on 1 August 1984 when the President signed the Executive order that effectuated the Manual for Courts-Martial. If this dicta is correct, the prosecution would still have to prove beyond a reasonable doubt that the alleged misconduct violated the custom. Serino. In Clarke, the Army court reemphasized this theory and stated categorically that there is also such a custom precluding certain relationships between NCO's and their subordinates. The Court of Military Appeals, however, has refused to adopt the Army court's interpretation of paragraph 83. Wales.

E. Conduct Prejudicial or Service Discrediting. The harm must be direct and palpable. Tedder. There is no conduct known as "simple fraternization" which does not prejudice good order and discipline. Adames.

5616 **CONSTITUTIONALITY**. Since the Supreme Court's decision in Parker v. Levy in 1974, constitutional attacks on the Navy's fraternization policy have largely failed. In Parker, the Court recognized the military's special need for discipline, against which certain personal liberties may pale.

A. Freedom of Association. This right is accorded less weight because of the negative impact fraternization has on discipline. The prohibition is "valid and necessary." Stanton v. Froehlke.

B. Vagueness. The existence of a long-acknowledged custom and the circumstances surrounding the misconduct make the prohibition against fraternization specific. Pitasi; Van Steenwyk; Moultak; Parker v. Levy.

C. Equal Protection. Officers have always been held to a higher standard of conduct, so it is reasonable to single them out. Means; Moultak. Some regulations governing fraternization apply to instructor-student relationships, even when the instructors are also enlisted. Singling out this group of enlisted personnel has also been held to be reasonable because of their temporary special status as teachers. Hoard. The fraternization policy is gender neutral.

D. Privacy. There is no right to privacy when it compromises discipline. Adams. The need for discipline has been called a compelling state interest when weighed against a member's need for sexual privacy. McFarlin.

5617 **ALTERNATE THEORIES OF PROSECUTION.** For cases of overfamiliarity between ranks which do not fit the elements described in Part IV, para. 83, MCM, 1984, there may be other means of prosecution.

A. Fraternization may now also be charged under article 92(1) as a violation of Art. 1165, U.S. Navy Regulations, 1990, regardless of whether the accused is an officer or enlisted member. A description of prohibited conduct under article 1165 is set out above.

B. The conduct may also violate "an other lawful order" or regulation and be punishable under Art. 92(2), UCMJ. Since fraternization has a detrimental effect on morale and discipline, the participants may be subject to a lawful written or verbal order to cease and desist. Carter (enlisted-enlisted fraternization in the chain of command violated the ship's order); Calloway (Officer-officer fraternization in the chain of command is an offense); Cantu (Articles 134 and 92). Failure to terminate the relationship may constitute willful disobedience under Articles 90 or 91, UCMJ.

C. The underlying conduct might itself constitute a separate crime such as adultery, sodomy, drug abuse, or even dereliction. Conn; Johanns; Lovejoy; Serino.

D. The conduct may be such that it would constitute conduct unbecoming an officer and gentleman in violation of Article 133, UCMJ. See Part IV, para. 59, MCM, 1984. Graham; Parini; Baker (Partying with enlisted and passing out in bed next to an enlisted man does not reach that level of dishonor to be considered "conduct unbecoming"). Johanns; Shober.

5618 **PLEADING.** The sample specification for the listed fraternization offense appears at Part IV, para. 83f, MCM, 1984. Where fraternization is alleged under Article 134, UCMJ, and the same conduct is alleged under article 133, the offenses will merge for findings with the conduct unbecoming. Rodriquez; Jefferson.

Where fraternization and the underlying misconduct such as adultery or sodomy are both alleged, the offenses may merge for punishment purposes. Lovejoy; Fox (adultery and fraternization). Where there is conduct amounting to fraternization which is different from the underlying offense which is also alleged, the offenses may be separate for sentencing also. Smith. Pleading the same conduct as fraternization and violation of a local order or regulation is multiplicitious charging. Cantu.

FRATERNIZATION CASES

United States v. Adams, 19 M.J. 996 (A.C.M.R. 1985)
United States v. Adames, 21 M.J. 465 (C.M.A. 1986)
United States v. Arthen, 32 M.J. 541 (A.F.C.M.R. 1990)
United States v. Baker, N.M.C.M. 84-4043 (30 August 1985)
United States v. Calloway, 21 M.J. 770 (A.C.M.R. 1986)
United States v. Cantu, 22 M.J. 819 (N.M.C.M.R. 1986)
United States v. Carter, 23 M.J. 683 (N.M.C.M.R. 1986)
United States v. Clarke, 25 M.J. 631 (A.C.M.R. 1987)
United States v. Conn, 6 M.J. 351 (C.M.A. 1979)
United States v. Cottrell, 32 M.J. 675 (A.F.C.M.R. 1991)
United States v. Fox, 32 M.J. 744 (A.F.C.M.R. 1990)
United States v. Free, 14 C.M.R. 466 (N.B.R. 1953)
United States v. Graham, 9 M.J. 556 (N.C.M.R. 1980)
United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981)
United States v. Jefferson, 21 M.J. 203 (C.M.A. 1986)
United States v. Johanns, 20 M.J. 155 (C.M.A. 1985)
United States v. Livingston, 8 C.M.R. 206 (A.B.R. 1952)
United States v. Lovejoy, 42 C.M.R. 210 (C.M.A. 1970)
United States v. Lowery, 21 M.J. 998 (A.C.M.R. 1986)
United States v. March, 32 M.J. 740 (A.C.M.R. 1991)
United States v. Mayfield, 21 M.J. 418 (C.M.A. 1986)
United States v. McFarlin, 19 M.J. 790 (A.C.M.R. 1985)
United States v. Means, 10 M.J. 162 (C.M.A. 1981)
United States v. Moultak, 21 M.J. 822 (N.M.C.M.R. 1985), *affd*,
24 M.J. 316 (C.M.A. 1987)
United States v. Nelson, 22 M.J. 550 (A.C.M.R. 1986)
Parker v. Levy, 417 U.S. 733 (1974)
United States v. Parini, 12 M.J. 679 (A.C.M.R. 1981)
United States v. Parrillo, 31 M.J. 886 (A.F.C.M.R. 1990)
United States v. Pitasi, 44 C.M.R. 31 (C.M.A. 1971)
United States v. Rodriquez, 18 M.J. 363 (C.M.A. 1984)
United States v. Serino, 24 M.J. 848 (A.F.C.M.R. 1987)
United States v. Smith, 18 M.J. 786 (N.M.C.M.R. 1984)
Stanton v. Froehlke, 390 F. Supp. 503 (D.D.C. 1975)

SPECIAL COURT-MARTIAL PUNISHMENT CHART

PERMISSIBLE PUNISHMENTS	Enlisted	O's and WO's
BCD	YES	NO
Confinement	6 MONTHS	NO
Bread & Water Diminished Rations	3 DAYS FOR SHIP- BOARD E-1 TO E-3	NO
Restriction	60 DAYS	60 DAYS
Hard Labor w/o confinement	90 DAYS	NO
Forfeiture of 2/3 Pay Per Month	6 MONTHS	6 MONTHS
Fine	YES BUT FINE AND FORFEITURE TOTAL MAY NOT EXCEED MAX FORFEITURE CEILING	
Reduction	YES, TO THE LOWEST PAY GRADE	NO
Loss of Numbers	NO	YES
Reprimand	YES	YES

GENERAL COURT-MARTIAL PUNISHMENT CHART

PERMISSIBLE PUNISHMENTS	Enlisted	Warrant O's	Officers
Death	YES	YES	YES
Dismissal DD BCD	NO YES YES	NO YES NO	YES NO NO
Confinement	YES, MAXIMUM SPECIFIED IN MCM, PART IV.		
Bread & Water Dim. Rations	PERMISSIBLE ONLY FOR SHIPBOARD PERSONNEL IN PAY GRADE E-3 OR BELOW; 3 DAYS MAXIMUM		
Restriction	60 DAYS	60 DAYS	60 DAYS
Hard Labor w/o confinement	90 DAYS	NO	NO
Forfeiture of all Pay & Allowances	YES	YES	YES
Fine	YES	YES	YES

United States v. Stocken, 17 M.J. 826 (A.C.M.R. 1984)
United States v. Tedder, 18 M.J. 777 (N.M.C.M.R. 1984), aff'd,
24 M.J. 176 (C.M.A. 1987)
United States v. Van Steenwyk, 21 M.J. 795 (N.M.C.M.R. 1985)
United States v. Wales, 31 M.J. 301 (C.M.A. 1990)
United States v. Wilson, 32 C.M.R. 517 (C.M.A. 1962)

SEXUAL HARASSMENT

5619 SEXUAL HARASSMENT REFERENCES

- A. Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972.
- B. The Civil Service Reform Act.
- C. Equal Employment Opportunity Commission Management Directive 704.
- D. SECNAVINST 5300.26A of 2 August 1989.
- E. OPNAVINST 5300.9 of 6 November 1989.
- F. MCO 5300.10
- G. Article 1166, U.S. Navy Regulations (1990).

5620 **INTRODUCTION.** The Navy requires a professional and productive work environment. The entire organization benefits from effective teamwork and good morale. Since both men and women are part of the Navy Team, both genders must be able to work together effectively to ensure maximum productivity and mission accomplishment. Sexual harassment is a type of sex discrimination which interferes with performance and creates an intimidating, hostile, and inefficient work environment. Military and civilian leaders have a duty to take steps to prevent sexual harassment.

A. Defined. Sexual harassment is a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

1. Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career;
2. submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting this person; or
3. such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment.

B. Behavior. Sexual harassment refers to inappropriate and unacceptable behavior in the work environment which adversely affects work productivity. Generally, the term includes any behavior with sexual overtones which is intimidating or offensive to the recipient or observer of the behavior. The harassment is usually directed toward a specific person and manifests itself in several observable behaviors. The sexual nature of the conduct may be explicit or implicit. The conduct may be deliberate or repeated. Unlawful conduct may be verbal or physical. Sexual harassment may range from the obvious offensive touching to the more subtle double entendres or the display of sexist cartoons, magazines, or pictures. Rabidue v. Texas-American Petrochemicals, 805 F.2d 611 (6th Cir. 1986)(Obscene comments and sexist photographs/posters).

5621 COMMAND ACTION

A. Training. OPNAVINST 5300.9 requires initial orientation and periodic training for all Navy personnel on the identification and prevention of sexual harassment. Every member of the command has the responsibility to ensure the work environment is free from sexual harassment.

B. Victim Response. SECNAVINST 5300.26A provides that "[i]ndividuals who are sexually harassed by supervisors, co-workers, or peers should make it clear that such behavior is offensive and report the incident to the appropriate supervisory level."

C. Command Response. Civilian and military leaders have full authority and responsibility for setting standards of conduct and performance for their subordinates. On receipt of a sexual harassment complaint, SECNAVINST 5300.26A requires the "appropriate supervisor will examine the matter and take actions necessary to ensure a work environment free from sexual harassment"

5622 **ACTION AGAINST MILITARY OFFENDERS.** In addition to the service instructions developed to provide guidance and policy, numerous articles of the UCMJ cover the variety of behaviors determined to be sexual harassment.

A. Article 93, UCMJ. An accused may be convicted under Article 93 for cruelty, oppression, or maltreatment of a person subject to their orders. The victim need not be under the direct command of the accused or subject to the code. The offense lies if the victim's duties require obedience to the accused's lawful orders. United States v. Dickey, 20 C.M.R. 486 (1956). The MCM states that sexual harassment may constitute this offense, defining that term to include influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors and deliberate or repeated offensive comments or gestures of a sexual nature.

B. Article 92, UCMJ. SECNAVINST 5300.26A and Article 1166, U.S. Navy Regulations (1990) are nonpunitive. The standards of conduct directive, however, contains punitive provisions. Paragraph 904.a of SECNAVINST 5370.2J prohibits improper use of one's official position as follows:

1. Naval Personnel shall not use their official positions to improperly induce, coerce, or influence any person, particularly subordinates, defense contractors, and potential defense contractors, to provide any benefit, financial or otherwise, to themselves or to others.

2. This language fairly encompasses sexual harassment. The prohibition applies to military AND civilian personnel.

C. Other Punitive Articles. Conduct which is alleged to constitute sexual harassment will often also make out an underlying offense of the UCMJ, e.g. simple assault. See the chart at the end of this chapter for other possibilities. The duty of the victim under SECNAVINST 5300.26A to complain to the perpetrator is not a condition precedent to prosecution or administrative action.

5623 **ACTION AGAINST CIVILIAN OFFENDERS.** A special provision of the Civil Rights Act prohibits sex discrimination in employment by the Federal Government and makes the Civil Service Commission (CSC) the agency responsible for ensuring that federal employment is free from discrimination based on sex. Under Title VII, the basis for determining whether the actions constitute discrimination is the effect, impact, or result of the conduct. The actor's intent is irrelevant. Accordingly, a claim that the harassment was entirely unintentional will not prevail as a defense. Behavior can lay the foundation for a sexual harassment charge whether alleged by the victim or a bystander.

A. Civil Actions. The rights of Federal employees contained in 42 U.S.C. § 2000e-16 are preemptive. The section creates a private right of action against the Federal Government; sovereign immunity is waived. Applicants for employment with military departments are specifically covered.

B. Administrative Remedies. Before bringing a civil action, however, the employee must exhaust the available administrative remedies. Under 42 U.S.C. § 2000e-16, the victim must file complaint with CSC. The victim sue after entry of final decision on that complaint or passage of 180 days from date of filing without entry of final decision.

C. Grounds. Title VII specifically prohibits discrimination in the hiring and firing of individuals or in any other "terms and conditions of employment" based on race, color, religion, national origin, or sex. Federal courts are attempting to establish a clearer standard of what constitutes sexually harassing behavior. Social invitations, flirting, and isolated incidents of rude behavior by co-employees that made the plaintiff "uncomfortable" have been held insufficient to alter a "term, condition or privilege" of employment. A contrary result may lie where the employer's conduct is so egregious as to, in the interest of justice, dictate the imposition of liability. Katz v. Dole, 709 F.2d 251 (4th Cir. 1983)(Sexual harassment demonstrated by extremely vulgar and offensive sexually related epithets by supervisory personnel and co-workers toward sole female air traffic controller in the crew; her superiors reacted to her complaints with further sexual harassment or indifference).

D. Victim Consent. An employee's Title VII claim may be adversely affected where it is shown that the employee participated in, or consented to, the sexual conduct occurring in the work environment. Participation or consent establishes a rebuttable presumption that can only be overcome by evidence reflecting that the employee later gave specific notice to the alleged harasser that such conduct was no longer welcome.

5624 **LIABILITY FOR SUBORDINATE HARASSMENT.** Senior employers are not automatically liable for sexual harassment by junior supervisors or the victim's co-workers. Cases have turned on whether the employer knew or should have known of the harassment and upon the character of the employer's action or inaction in the wake of a complaint. Supervisory indifference in the face of verbal harassment has been the basis of liability. Merely investigating the complaint has been held to be insufficient to avoid liability. Corrective measures, including disciplinary action if appropriate, will be required to indicate the command's willingness to support and enforce a policy of prohibiting sexual harassment and preclude the imposition of liability. In Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the Supreme Court set out four factors to consider in determining employer liability in cases not involving quid pro quo allegations:

- A. Whether the employer had an established and specific policy prohibiting sexual harassment in the workplace;
- B. whether the policy was communicated to employees;

- C. whether and when the employer learned of the alleged harassment; and
- D. if the employer knew of the conduct, whether the employer's response was adequate.

5625 SEXUAL HARASSMENT AND THE UCMJ

If the sexual harasser:

The harasser may be guilty of:

- | | |
|---|---|
| 1. Threatens to influence adversely the career, salary or job of another in exchange for sexual favors. | Extortion, Art. 127;
Assault, Art. 128;
Communicating a threat, Art. 134. |
| 2. Offers rewards for sexual or gestures. | Bribery and graft, Art. 134 |
| 3. Makes sexual comments and/or gestures. | Indecent, insulting or obscene language prejudicial to good order and discipline, Art. 134
Provoking speech or gestures, Art. 117; Disrespect, Arts 89, 91 |
| 4. Makes sexual contact. | Assault Consummated by a battery, Art. 128; Rape, Art. 120; Indecent assault |
| 5. Engages in sexual harassment to the detriment of job performance. | Dereliction of duty, Art. 92 |
| 6. Is an officer. | Conduct unbecoming an officer, Art. 133 |
| 7. Is cruel to or maltreats any person subject to his or her orders. | Cruelty and maltreatment, Art. 93 |
| 8. Uses his or her official position to gain sexual favors or advantage. | Failure to obey a lawful general order, Art. 92 |

URINALYSIS CASES

5626 **URINALYSIS CHECKLIST.** Each urinalysis should be conducted with the understanding that positive samples could result in administrative or disciplinary action. Collection procedures should be designed to avoid problems during administrative and disciplinary proceedings. Certain procedures have proven to be most effective in establishing the source of the urine sample.

A. Unit Coordinator. The unit coordinator should:

1. Ask for the member's ID card.
2. Compare the ID picture with the face of the member.
3. Copy the social security number from the ID card onto the urinalysis label and chain of custody.
4. Copy the name and social security number from the card into the urinalysis ledger.
5. Allow the subject to verify the label information and chain of custody form.
6. Place the label on a urine sample bottle and hand bottle to member for production of a sample under supervision of observer.
7. When member returns the sample, ask the member if the bottle contains his/her urine.
8. Again, allow member to verify the information on the label, chain of custody form, and ledger.
9. Have subject initial label.
10. Take sample bottle from bottom to confirm that it is warm.
11. Have member sign ledger.
12. Have observer sign ledger.
13. Have coordinator sign ledger.
14. Place bottle in original cardboard container.

15. After collecting all samples, sign the chain of custody document as releaser and hand carry/send samples to the appropriate screening laboratory.

B. Observer. The observer should:

1. Walk with member from coordinator's table to the head.
2. Ensure male members use the urinal only. If there are two urinals, side-by-side, only one member should provide a sample at any one time. If there are more than two urinals, no more than two members should give samples at one time and each should use one of the two end urinals. If the member is female, keep the stall door open.
3. Stand and observe the urine actually entering the bottle.
4. Accompany the member back to the coordinator's table.
5. Initial and sign the ledger.

C. Problems. Problems arise when:

1. One person tries to observe multiple members at one time.
2. The observer is unprepared.
3. The observer fails to initial the ledger.
4. The observer fails to sign the ledger, or no ledger is maintained.
5. The member is absent when the label is finally attached to the bottle.
6. The observer does not accompany the member from the unit coordinator's table to the head and back.
7. The same exact procedures are not used on every member.
8. Only the last four digits of the social security number are printed on the label.
9. Unit coordinators or observers perform those duties within 90 days preceding their detachment, not mindful that if a case goes to trial they must be brought back at command expense.

URINALYSIS CONSENT FORM

I, _____, have been requested to provide a urine sample. I have been advised that:

- (1) I am suspected of having unlawfully used drugs;
- (2) I may decline to consent to provide a sample of my urine for testing;
- (3) if a sample is provided, any evidence of drug use resulting from urinalysis testing may be used against me in a court-martial.

I consent to provide a sample of my urine. This consent is given freely and voluntarily by me, and without any promises or threats having been made to me or pressure or coercion of any kind having been used against me.

Signature

Date

Witness' Signature

Date

DRUG SCREENING LABS

Address	Telephone/Message Address
Commanding Officer Navy Drug Screening Laboratory Naval Air Station Jacksonville, FL 32214-5240	AUTOVON: 942-7760 Commercial: (904) 777-7760/7761 NAVDRUGLAB JACKSONVILLE FL FL//JJJ//
Commanding Officer Navy Drug Screening Laboratory Bldg. 38-H Great Lakes, IL 60088-5223	AUTOVON: 792-3701 Commercial: (312) 688-6862 NAVDRUGLAB GREAT LAKES IL IL//JJJ//
Commanding Officer Navy Drug Screening Laboratory Naval Air Station, Bldg. S-33 Norfolk, VA 23511-6295	AUTOVON: 564-8089 Commercial: (804) 444-8120/8089 NAVDRUGLAB NORFOLK VA VA//JJJ//
Commanding Officer Navy Drug Screening Laboratory Bldg. 65, 8750 Mountain Blvd. Oakland, CA 94627-5050	AUTOVON: 855-6184 Commercial: (415) 633-6175/6176 NAVDRUGLAB OAKLAND CA CA//JJJ//
Commanding Officer Navy Drug Screening Laboratory Naval Hospital, Bldg. 26-2B San Diego, CA 92134-6900	AUTOVON: 522-9372 Commercial: (619) 532-2349 NAVDRUGLAB SAN DIEGO CA CA//JJJ//

AREAS OF RESPONSIBILITY

NDSL Jacksonville: Those units designated by CINCLANTFLT or CMC and those undesignated units in geographic proximity.

NDSL Great Lakes: All activities assigned to CNET, all USMC accession points as designated by CMC, and selected naval activities located in the Great Lakes area.

NDSL Norfolk: Those units designated by CINCLANTFLT, CMC, or CINCUS-NAVEUR and those undesignated units in geographic proximity.

NDSL Oakland: Those units designated by CINCPACFLT or CMC and those undesignated units in geographic proximity.

NDSL San Diego: Those units designated by CINCPACFLT or CMC and those undesignated units in geographic proximity.

USE OF URINALYSIS RESULTS

BASIS FOR URINALYSIS	USE OF RESULTS	NJP, SCM, SPCM, GCM	Basis for admin sep'n	Basis for OTH
Search or Seizure Probable Cause Member's Consent		YES	YES	YES
Inspections Random or Unit Sweep		YES	YES	YES
Valid Medical Purpose		YES	YES	YES
Fitness for Duty Mishap/Safety Investigation All other Competency Exams		NO NO	NO YES	NO NO
Service Directed Rehab. Facility Staff Drug/Alcohol Rehab. Testing PCS Overseas, Brigs, "A" School Accession testing		YES NO YES NO	YES YES YES YES	YES NO YES NO

SOURCE: Appendix A to Enclosure (4)
OPNAVINST 5350.4A

5627

RECENT URINALYSIS CASES

A. Adherence to Regulations. United States v. Konieczka, 31 M.J. 289 (C.M.A. 1990)(Installation alcohol and drug control officer (DACO) forwarded accused's urine sample for further testing even though the prescreen tests were negative because he suspected that the sample would test positive, not for quality control purposes. DACO's conduct was not authorized by service regulations and subjected accused to an unlawful inspection); United States v. Strozier, 31 M.J. 283 (C.M.A. 1990)(Gross deviations and gross discrepancies from urinalysis regulation may warrant exclusion of positive test results); But see United States v. Pollard, 27 M.J. 376 (C.M.A. 1989) (deviation from urinalysis regulation did not make sample inadmissible).

B. Negating Probable Cause. United States v. Poole, 30 M.J. 271 (C.M.A. 1990)(Probable cause to order a urinalysis for marijuana metabolite was undercut and then destroyed by two negative field tests of the accused's urine. Results of a third test, this time done by a laboratory, were inadmissible because there was no longer probable cause to justify seizing the urine. Servicemember has a "Fourth Amendment interest in not being required to report repeatedly for compulsory urinalysis based on the same purported probable cause." Subordinate's knowledge of negative field test results can be imputed to the commander ordering the urine test).

C. Retesting Policy. United States v. Bickel, 30 M.J. 277 (C.M.A. 1990)(Commander's published policy requiring all soldiers whose urinalysis results indicated drug use to submit a second urine sample during the next scheduled urine inspection was proper. The results of the second urinalysis could be used to prosecute the accused even though there was no probable cause to order the second test. The second test was a continuation of the first "inspection" and was designed to determine if the initial "defect" had been corrected. Selection of the accused was rational and done pursuant to a clear, generally stated, published policy).

D. Criteria for Testing. United States v. Daskam, 31 M.J. 77 (C.M.A. 1990)(Order requiring everyone returning from UA to submit a urine sample for testing did not apply to chief petty officer who reported an hour or two late for work. Regulation was not intended to encompass accused because he neither "surrendered" nor was "apprehended" as an unauthorized absentee and was never beyond military control. Court did not rule on the validity of the order as applied to those truly unauthorized absentees who later returned to military control. Problems may also exist if a valid regulation is inconsistently applied).

E. Consent. United States v. McClain, 31 M.J. 130 (C.M.A. 1990)(Simmons overruled. Consent for urinalysis must be voluntary based on totality of the circumstances. If consent is not voluntary, test results are not admissible merely because there was probable cause to order the urinalysis. If involuntary consent is given to commander with the power to order urinalysis or to official with an actual search authorization, the urinalysis results may still be admissible); United States v. White, 27 M.J. 264 (C.M.A. 1988)(When commander told accused he would direct a command urinalysis if the accused

did not consent, the result was mere acquiescence); United States v. Cook, 27 M.J. 858 (A.F.C.M.R. 1989)(Urine test following disorderly conduct at a rock concert; consent not voluntary: failure to advise an accused of the critical difference between a consent and a command-directed urinalysis, once the subject is raised, converts what purports to be consent into mere acquiescence); United States v. Peoples, 28 M.J. 686 (A.F.C.M.R. 1989)(Accused was late for work and demeanor suggested drug use; consent not voluntary; commander failed to explain to accused that a consent or probable cause urinalysis may be used as evidence while a command-directed urinalysis may not); United States v. Whipple, 28 M.J. 314 (C.M.A. 1989)(Aviator has an auto accident, commander orders flight physical and requests urine sample, Navy doctor also requests sample; consent held voluntary where accused never asked what his options were and his commander never intimated that he could order him to give a sample).

F. Judicial Notice under M.R.E. 201. United States v. Murphy, 23 M.J. 310 (C.M.A. 1987); United States v. Harper, 32 M.J. 620 (A.C.M.R. 1991)(Military judge cannot take judicial notice that drug testing laboratories operate as required; urinalysis results without expert testimony interpreting tests "or some other lawful substitute" insufficient).

G. Reservist Jurisdiction. United States v. Chodara, 29 M.J. 943 (A.C.M.R. 1990).

UNAUTHORIZED ABSENCES/DESERTIONS

5628 NAVY UNAUTHORIZED ABSENCE

A. Policy. The policies and procedures regarding unauthorized absences and desertion of enlisted members are found in MILPERSMAN 3020220, 3430100, 3430150, 3430200, 3430250, 3430300, 3430350, 3640450. Consult these sections for further amplification of the checklist given below.

B. Procedures. The procedures for completing the service record entries can be found in MILPERSMAN sections above and PAYPERSMAN 10381, 90419, 90435.

C. Checklist

1. When a member is reported UA, immediately prepare a page 13 to document inception of UA.
2. When a member has been UA over 24 hours, ensure that the NAVPERS 601-6R is prepared. This will stop the servicemember's pay.
3. If member is absent less than 24 hours, prepare a page 13 to document the termination of absence.
4. If the member is gone 10 days, prepare a letter to the next of kin notifying them of the member's absence; his personal effects should be collected, inventoried, and placed in safekeeping; prepare NAVCOMPT 3060.
5. Upon return of a member gone less than 30 days, complete the NAVPERS 601-6R and decide what type, if any, disciplinary action will be taken.
6. If the member is gone 30 days, he/she is declared a deserter. This may be done earlier if there is an indication the member has no intention to return. The following documents should be prepared and actions taken:
 - a. Deserter message
 - b. DD Form 553 (Absentee Wanted by the Armed Forces)

- c. Charge sheet DD Form 458 - charge violation of Article 85, UCMJ. Prefer and receive charges only. Do not refer.
 - d. Any evidence of desertion should be gathered, such as: witness statements, pending incident complaint reports, restriction orders, any relevant message traffic, and any documentation of other pending disciplinary action
 - e. Obtain health, dental and pay records
7. If member is gone 180 days, send the following to NMPC:
 - a. Service record (including the page 601-6R, original charge sheet, and restriction orders)
 - b. Health record
 - c. Dental record
 - d. Pay record
8. After 180 days, send the personal effects to Naval Supply Center, Oakland, CA, or Supply Annex, Williamsburg, VA.
9. A deserter file should be retained by command. It should include the following:
 - a. Certified copy of the charge sheet
 - b. Certified copy of the restriction order
 - c. Right side of the service record
 - d. Copy of Page 601-6R
 - e. Performance evaluations
 - f. Last LES
 - g. Copy of DD 553
 - h. Copy of deserter message

- i. Any other relevant messages
- 10. Upon return of a member from UA, prepare page 13 documenting return.
- 11. Upon return of a member from UA over 24 hours, but less than 10 days, complete page 601-6R -- sending fourth copy to disbursing. This starts member's pay.
- 12. Upon return of a member from UA over 10 days, but less than 30 days, complete page 601-6R; prepare letter to the next of kin, notifying them of member's return.
- 13. Upon return of a member from UA over 30 days, complete page 601-6R; prepare letter to the next of kin, notifying them of member's return; and prepare return deserter message, if not done by an intermediate command.

5629

MARINE CORPS**A. References**

- 1. MCO P5800.8, Marine Corps Manual for Legal Administration (LEGADMINMAN), Chapter 5
- 2. MCO P1080.35 (PRIM)
- 3. MCO P4050.38, Marine Corps Personal Effects and Baggage Manual
- 4. MCO P1070.12, Marine Corps Individual Records and Administration Manual (IRAM)
- 5. MCO P5512.11, Uniformed Service Identification and Privilege Card, DD Form 1173
- 6. MCO P11000.17, Real Property Facilities Manual, Vol. X

B. Checklist

- 1. UA entry (in excess of 24 hours) run on unit diary
- 2. Page 12 SRB "to UA" entry made (IRAM 4015).

3. Inventory within 24 hours government and personal property of absentee accomplished.
4. After 48th hour of absence, CO telephoned NOK (if not in CONUS, only if dependents reside locally).
5. Prior to 10th day of UA, letter mailed to NOK and copy filed on document side of SRB (fig. 5-1, LEGALADMINMAN).
6. Prepare charge sheet THROUGH block IV prior to 31st day of absence for violation of article 85 and all other known charges.
 - a. Charges sworn to, block III.
 - b. Receipted for in block IV.
 - c. Original placed on document side of SRB.
7. Unit diary entry run declaring a deserter and dropping from roles to desertion on 31st day.
8. SRB pages 3, 12, and 23 completed per IRAM.
 - a. Chronological record (page 3).
 - b. Offenses and punishments (page 12) administratively declaring a deserter and dropping from rolls.
 - c. Markings page (page 23).
9. DD 553 prepared and distributed per para. 5002 of LEGALADMINMAN).
 - a. Date published matches that of page 12 entry date (normally 31st day of UA).
 - b. If insufficient information, priority message sent MMRB-10.
 - c. If incomplete information, permission requested MHL-30.

- d. Original sent to CMC (MHL-30) (Report Symbol MC-5800-01) within seven days of administrative declaration of desertion on page 12.
10. DD 553 distributed properly (para. 5002.2e(4) LEGALADMINMAN).
- a. Copy on document side of SRB.
 - b. Copy to NOK and all known associates.
 - c. Copy to each chief of police and county sheriff in area of civilian addressees of DD 553.
 - d. Copy to units assigned admin responsibility and appropriate area police (see MCO 5800.10).
11. If deserter has dependents, see para. 5004 of LEGALADMINMAN.
- a. Retrieved dependent ID cards.
 - b. If NOT surrendered, notify local medical facilities and military activities.
 - c. A TERMINATE DD 1172 submitted to DEERS.
 - d. Dependents directed to vacate quarters.
12. Return of deserter within 91 days.
- a. "From UA" entry made in diary.
 - b. Page 12 entry recording date, hour, and circumstances of return to military control (see 4015 of IRAM).
 - c. Page 12 SRB entry made removing mark of desertion (not removed if apprehended and/or convicted by civil authorities except as per LEGALADMINMAN).
 - d. If mark of desertion removed, notify disbursing office in writing of removal per LEGALADMINMAN.

13. If no return by 91st day of absence:
 - a. Audit of SRB, pages 3, 12, and 23 completed and entries correct.
 - b. Charge sheet on document side correctly receipts for charge prior to page 12 date accused dropped from rolls (if not, redo).

SAMPLE 10-DAY UA NOTIFICATION LETTER FOR NEXT OF KIN

DEPARTMENT OF THE NAVY

USS NEVERSAIL (AS 00)

FPO New York 09501

1610

00

Date

Mr. & Mrs. Ronald Jones
235 Long Street
Los Angeles, CA 14790-9999

Dear Mr. and Mrs. Jones:

I regret the necessity of informing you that your son, Yeoman Third Class Fred Paul Jones, who enlisted in the Navy on June 24, 19-2, and was attached to USS NEVERSAIL (AS 00), has been on unauthorized absence since June 25, 19CY. Should you know of his whereabouts, please urge him to surrender to the nearest naval or other military activity immediately, since the gravity of the offense increases with each day of absence. At this time, all pay and allowances, including allotments, have been suspended pending return to Navy jurisdiction. Should he remain absent for 30 days, we will declare him a deserter and a federal warrant will be issued. Information will be provided to the National Crime Information Center wanted person's file, which is available to all federal, state, and local law enforcement agencies.

Sincerely,

A. B. SEAWEEED
Captain, U.S. Navy
Commanding Officer

Copy to:

(Apply name and address of Reserve chaplain nearest the absentee's home of record, according to NAVMILPERSCOMNOTE 1600.)

Example:

Bee U. Humble
LCDR, CHC, USNR
1 Way Street
Upview, CA 12345-6789

SAMPLE LETTER NOTIFYING NEXT OF KIN OF RETURN FROM UA

DEPARTMENT OF THE NAVY
USS NEVERSAIL (AS 00)
FPO New York 09501

1610
00
DATE

Mr. & Mrs. Ronald Jones
235 Long Street
Los Angeles, CA 14790-9999

Dear Mr. and Mrs. Jones:

Please be advised that your son, Yeoman Third Class Fred Paul Jones, was returned to USS NEVERSAIL (AS 00), on December 24, 19CY. You may write to your son at the above address.

Sincerely,

A. B. SEAWEEED
Captain, U.S. Navy
Commanding Officer

Copy to:

(Include name and address of Reserve chaplain who was originally notified in the Letter of Notification, sent out on 10th day.)

Example:

Bee U. Humble
LCDR, CHC, USNR
1 Way Street
Upview, CA 12345-6789

[UPON RETURN OF ABSENTEE TO PARENT COMMAND, PREPARE A LETTER NOTIFYING NOK OF MEMBER'S RETURN - NO SPECIFIC LANGUAGE IS DICTATED BY MILPERSMAN. LANGUAGE OF LETTER IS LEFT TO DISCRETION OF PARENT COMMAND. WE RECOMMEND THAT THIS LETTER NOT BE SENT UNTIL THE ABSENTEE IS PHYSICALLY BACK ON BOARD THE COMMAND. SEE MILPERSMAN 3430200.1.c]

CHAPTER 57

POST-TRIAL REVIEW AND APPELLATE PROCEDURES

5701 **OVERVIEW.** This chapter discusses the general sequence of events in the post-trial court-martial review process, highlighting the SJA's responsibilities. References include:

- A. UCMJ, Articles 57, 62, 66, 67, 69, 71
- B. Rules of Court-Martial 908, 1101-1112, 1114, 1201-1205
- C. JAG Manual §§ 0151-0156, 162, 163
- D. 28 U.S.C. § 1259

5702 POST-TRIAL SESSIONS UNDER R.C.M. 1102

A. **Timing and Powers.** The military judge may call a post-trial session before the record is authenticated to consider newly discovered evidence and in proper cases may set aside findings of guilty and the sentence. United States v. Scaff, 29 M.J. 60 (C.M.A. 1989). Proceedings in revision may be conducted to correct an apparent error, omission, or improper or inconsistent action by the court-martial. The CA may direct an Article 39(a) session before taking initial action (or anytime if authorized by a reviewing authority) to inquire into and resolve any matter which arises after trial and which substantially affects the legal sufficiency of any finding of guilty or the sentence. The military judge shall take such action as may be appropriate. Article 39(a) proceedings shall be conducted in the presence of the accused. United States v. Caruth, 6 M.J. 184 (C.M.A. 1979).

B. **Limitations.** Post-trial sessions can not: increase the severity of a sentence unless the sentence is mandatory; reconsider a finding of not guilty as to a specification; reconsider a finding of not guilty as to a charge unless a finding of guilty to some other Article is supported by a finding as to a specification. United States v. Jordan, 32 M.J. 672 (A.F.C.M.R. 1991)(MJ erred in entering findings of guilty on two specifications; should have held a post-trial session); United States v. Wilson, 27 M.J. 555 (A.C.M.R. 1988)(TC failed to administer oath to 2 enlisted panel members; MJ held a proceeding in revision); United States v. Baker, 32 M.J. (C.M.A. 1991)(Post-trial 39(a) session to correct the omission in sentence announcement (The president failed to announce the adjudged DD) was ERROR; so held to avoid the appearance of unlawful command influence).

5703 **PREPARATION OF THE RECORD OF TRIAL.** Article 54, UCMJ, requires every court-martial to keep a record of the proceedings.

A. Verbatim. The ROT must be verbatim if a BCD has been adjudged or any portion of the sentence adjudged exceeds a punishment which may be adjudged by a SPCM. Executive Order 12708, Amendments to the Manual for Courts-Martial, United States, 1984, 23 Mar. 1990 [hereinafter Exe c. Order 12708]). United States v. Alston, 30 M.J. 969 (N.M.C.M.R. 1990)(Verbatim means entirely verbatim); United States v. Harmon, 29 M.J. 732 (A.F.C.M.R. 1989)(Tape recorder failure; burden on government to rebut presumption of prejudice); United States v. Sneed, 32 M.J. 537 (A.F.C.M.R. 1990)(DC argues ex parte motion telephonically to military judge; TC rebutted presumption); United States v. Kyle, 32 M.J. 724 (A.F.C.M.R. 1991)(Documents reviewed in camera must be sealed and attached to the ROT). The appendix to this chapter includes a discussion of frequent errors in ROT preparation.

B. Authentication. Article 54 (a), UCMJ, requires authentication by the military judge unless dead, disabled or absent. United States v. Cruz-Rijos, 1 M.J. 429 (C.M.A. 1976). Trial counsel may authenticate the ROT only if the military judge is genuinely unavailable for a lengthy period of time. United States v. Lott, 9 M.J. 70 (C.M.A. 1980)(PCS to distant duty station qualifies); United States v. Walker, 20 M.J. 971 (N.M.C.M.R. 1985) (30 days leave is a prolonged absence). A statement of the reasons for substitute authentication should be included in the ROT. If multiple judges are on the record, each must authenticate their portion. United States v. Martinez, 27 M.J. 730 (A.C.M.R. 1988). If the authenticated ROT is lost, produce a new ROT for authentication. An authenticated ROT can be corrected only by the certificate of correction process.

5704 **SUBMISSION OF R.C.M. 1105 MATTERS.** After the record of trial (ROT) is authenticated, the accused will be served with a copy; the accused's receipt for the copy must be attached to the original ROT. The accused must be served well before the CA's action. The accused is also given the opportunity to submit matters which may affect the CA's action. This R.C.M. 1105 clemency letter may include clemency recommendations, matters in mitigation not in the record, and allegations of error. The matters need not be in writing. United States v. Davis, 29 M.J. 1004 (A.F.C.M.R. 1990)(CA should have considered the accused's 35 minute videotaped statement recounting his experiences of sexual molestation as a child, despite seemingly restrictive language of R.C.M. 1105). This option must be exercised within 10 days of service of the authenticated ROT, in the case of a GCM or SPCM, and within 7 days after the sentence of a summary court-martial is announced.

5705 **RECOMMENDATION OF THE SJA OR LEGAL OFFICER UNDER R.C.M. 1106.** Before the CA can act on any GCM/BCD-SPCM case, the

SJA or legal officer (LO) must submit a written recommendation to assist the CA in making an appropriate disposition.

A. Qualifications. An officer is disqualified from preparing a post-trial recommendation if the officer's actions before or during trial appear to create a risk that the officer will be unable to evaluate the evidence objectively and impartially. United States v. Decker, 15 M.J. 416 (C.M.A. 1983)(SJA who obtained immunity or clemency for a witness in the case held not disqualified); United States v. Grinter, 28 M.J. 840 (A.F.C.M.R. 1989)(Officer initially appointed as article 32 IO was disqualified even though investigation was waived).

B. Contents. The recommendation shall contain the findings and sentence adjudged, a summary of the accused's service record, the nature and duration of any pretrial restraint, any pretrial agreement obligations, any recommendations by the military judge, a specific recommendation as to action to be taken, and, if prepared by an SJA, a response to any allegation of legal error raised in the accused's R.C.M. 1105 letter. Neither the SJA nor the LO, however, is required to examine the record for legal error [R.C.M. 1106(d)(4)]. If the SJA deems it appropriate to take corrective action on findings or sentence or if the accused alleges a legal error in the matters submitted under R.C.M. 1105, the SJA must state an opinion as to the need for corrective action. No analysis or rationale is required to be included. United States v. Keck, 22 M.J. 755 (N.M.C.M.R. 1986). The SJA must respond even if the DC states the issue inartfully. United States v. Hill, 27 M.J. 293 (C.M.A. 1988). The JAG Manual provides a sample form at appendix A-1-x.

C. Exceptions to the Requirement. No recommendation is needed for complete acquittals or other final terminations without findings. This now includes findings of not guilty only by reason of lack of mental responsibility. Exec. Order 12708 amending R.C.M. 1106(e).

SAMPLE STAFF JUDGE ADVOCATE RECOMMENDATION

7 Jul 19CY

From: Staff Judge Advocate, Naval Surface Group FOUR

To: Commander, Naval Surface Group FOUR

Subj: RECOMMENDATION IN THE SPCM CASE OF YEOMAN SEAMAN JOHN Q.
PUBLIC, USN, 111-22-3333

Ref: (a) R.C.M. 1106, MCM, 1984

(b) JAGMAN § 0151c

Encl: (1) Record of trial ICO YNSN John Q. Public, USN

1. Pursuant to references (a) and (b), the following information is provided:

a. Offenses, pleas, and findings:

Charges and specifications	Pleas	Findings
Charge I: Violation of Article 86, UCMJ.	Guilty	Guilty
Specification: Unauthorized absence from his unit, USS EDSON, from 13 July 19CY(-1) to his surrender on 5 March 19CY.	Guilty	Guilty
Charge II: Violation of Article 121, UCMJ.	Guilty	Guilty
Specification: Larceny of a radio of a value of about \$125.00, the property of Fireman Stoke T. Coals, U.S. Navy.	Guilty	Guilty

b. Sentence adjudged: On 15 June 19CY, the accused was sentenced to reduction to the grade of E-2, confinement for a period of 120 days, forfeiture of \$200.00 pay per month for 4 months, and to be discharged from the naval service with a bad conduct discharge.

c. Clemency recommendation by court or military judge: None.

d. Summary of accused's service record:

(1) Length of service: 3 years 2 months.

(2) Character of service: 3.4 average of evaluation traits.

(3) Awards and decorations: The accused is not entitled to any awards, medals or commendations, except the Sea Service Deployment Ribbon.

(4) Records of prior nonjudicial punishment: CO's NJP on 1 September 19CY(-2) for a violation of Article 86, UCMJ, for missing morning muster on 28 August 19CY(-2). Awarded 15 days restriction to the limits.

(5) Previous convictions: Conviction by summary court-martial at which he was represented by lawyer counsel on 8 October 19CY(-2) for a violation of Article 121, UCMJ, wrongful appropriation of government property, for which a sentence of 1 month confinement and reduction to the grade of paygrade E-1 was finally approved. Conviction by special court-martial on 17 February 19CY(-1), for a violation of Article 86, UCMJ, unauthorized absence for a period of 27 days, for which a sentence of confinement for 1 month and forfeiture of \$50.00 pay per month for 2 months was finally approved.

(6) Other matters of significance: None.

e. Nature and duration of pretrial restraint: The accused was in pretrial confinement from 29 May to 4 June 19CY, a period of 7 days. Per the decision rendered in United States v. Allen, 17 M.J. 126, the accused will be credited with 7 days of confinement against the sentence to confinement adjudged.

f. Judicially ordered credit to be applied to confinement, if any: None.

g. Terms and conditions of pretrial agreement, if any, which the convening authority is obligated to honor or reasons why the convening authority is not obligated to take specific action under the agreement: A pretrial agreement was submitted in this case and approved on 12 June 19CY. In return for the accused's provident guilty plea to all charges and specifications, the terms of this agreement called for a limitation on the punishment as follows:

Confinement: If adjudged, confinement in excess of 4 months will be disapproved.

Restriction: As adjudged.

Forfeitures:	If adjudged, forfeitures in excess of \$150.00 pay per month for a period of 4 months will be disapproved.
Fine:	As adjudged.
Reduction:	As adjudged.
Punitive discharge:	As adjudged.

Your obligations concerning the terms of the pretrial agreement in this case are as follows: Since the confinement and forfeitures awarded are less than that provided for in the agreement, you are not obligated to suspend or disapprove any portion. The confinement, forfeitures, and bad-conduct discharge may be approved as adjudged.

h. The record of trial was served on the accused on 5 July 19CY. On behalf of the accused, the detailed defense counsel, LCDR I. Freeum, JAGC, USNR, has submitted a request for clemency in the form of reduction in confinement to be approved.

2. In my opinion, the court was properly constituted and had jurisdiction over the accused and the offense. The accused was found guilty in accordance with his pleas. The proceedings were conducted in substantial compliance with current regulation and policy. The offenses of which the accused was found guilty are described as offenses under the UCMJ. There is no error noted nor any issues of error raised by the accused or his counsel. The sentence as adjudged is legal and appropriate.

3. I recommend that the sentence as adjudged be approved in accordance with the terms of the pretrial agreement. I further recommend that YNSN Public be reduced to the grade of E-1 as authorized by Article 58a(a) of the Uniform Code of Military Justice.

R. U. GUILTY

D. Service on Defense for R.C.M. 1106 Response. Before forwarding the recommendation to the CA, the SJA/LO shall serve a copy on the DC AND the accused. If it is impracticable to serve the accused, his copy shall be forwarded to the DC. A statement shall be attached to the record explaining why the accused was not personally served. DC shall be allowed 10 days to respond to the recommendation (20 additional days may be granted) for a response. Failure of the DC to submit a timely response may waive certain errors in the recommendation, except plain error. United States v. Huffman, 25 M.J. 758 (N.M.C.M.R. 1987)(Plain error where findings and sentence were erroneously reported). If the DC's response contains an allegation of legal error, the SJA must respond to it.

MEMORANDUM FORWARDING STAFF JUDGE ADVOCATE RECOMMENDATION
TO DETAILED DEFENSE COUNSEL

9 Jul 19CY

From: Staff Judge Advocate, Commander Naval Surface Group FOUR
To: LCDR I. Freeum, JAGC, USNR, Naval Legal Service Office,

Subj: SPCM CASE OF YEOMAN SEAMAN JOHN Q. PUBLIC, USN,
111-22-3333

Ref: (a) Article 64, UCMJ
(b) R.C.M. 1106(f)(1)

Encl: (1) Copy of SJA's post-trial review ICO YNSN John Q. Public, USN

1. Pursuant to reference (a), a review of the court-martial of YNSN Public has been conducted. Enclosure (1) is a copy of this review.
2. Pursuant to rules established by reference (b), you are hereby served with a copy of this review in order to afford you an opportunity to correct or challenge any matter therein which you may deem erroneous, inadequate or misleading, or upon which you may otherwise wish to comment. Proof of service of this review upon you, together with any such correction, challenge or comment you may make, shall be made a part of the record of proceedings.
3. You are advised that your failure to take advantage of the aforementioned opportunity within 10 calendar days from date of this service will normally be deemed a waiver of any error in the review.
4. You are requested to acknowledge receipt of this letter, with attached copy of review, by immediately completing the first endorsement.

R. U. GUILTY

DEFENSE COUNSEL'S ACKNOWLEDGEMENT OF
RECEIPT OF STAFF JUDGE ADVOCATE RECOMMENDATION

FIRST ENDORSEMENT on SJA, NAVSURFGRU FOUR ltr of 9 Jul CY

From: LCDR I. Freeum, JAGC, USNR, Naval Legal Service Office

To: Staff Judge Advocate, Naval Surface Group FOUR

1. I, the undersigned, counsel for the accused in the above-captioned proceedings, hereby acknowledge receipt of the aforementioned staff judge advocate's review required by Article 64, UCMJ, for the subject case on this 11th day of July 19CY.

I. FREEUM

DETAILED DEFENSE COUNSEL'S RESPONSE TO SJA RECOMMENDATION

From: LCDR I. Freeum, JAGC, USNR, Naval Legal Service Office

To: Staff Judge Advocate, Naval Surface Group FOUR

Subj: RECOMMENDATION IN THE SPCM CASE OF YEOMAN SEAMAN JOHN Q.
PUBLIC, USN, 111-22-3333

Ref: (a) SJA review ICO YNSN John Q. Public, USN

(b) R.C.M. 1106(f)(4)

Encl: (1) Mr. R. D. Public's ltr of 7 July 19CY

(2) Mrs. R. D. Public's ltr of 5 July 19CY

(3) Mrs. J. Q. Public's ltr of 4 July 19CY

1. Reference (a) was received by me on 11 July 19CY and has been reviewed pursuant to reference (b).

2. I do not desire to submit a correction, challenge, or comment to the attached review.

3. The enclosures are letters from the accused's parents and his wife, Mrs. Public, for the convening authority's consideration.

E. Addenda. R.C.M. 1106(f)(7) provides that the SJA/LO may supplement his recommendation based upon the defense counsel's response. The DC must be served with any supplement containing new matter and be given an opportunity to comment. United States v. Anderson, 25 M.J. 342 (C.M.A. 1987). The same time periods apply. Serving the accused as well is a safe practice.

5706 **CA'S ACTION.** The first official action to be taken with respect to the results of a trial is the CA's action, which will, as a practical matter, be drafted by the SJA/LO per the CA's wishes. The responsibility for the CA's action cannot be delegated. In exceptional circumstances, JAG Manual § 0145 authorizes the CA to forward the case to a specifically designated officer exercising general court-martial authority (GCMA) with a statement of the reasons why the CA is unable to act (e.g., the CA was a witness for the prosecution on a disputed issue or became an accuser after referral).

A. Before the Action. Before taking action, the CA shall consider the result of trial, the SJA/LO recommendation when required, and any matter submitted by the accused pursuant to R.C.M. 1105 (clemency letter) and 1106 (response to SJA/LO recommendation). [R.C.M. 1107(b)(3)(A)]. The C.M.A. recommends listing each enclosure (petitions for clemency, etc.) that goes to the CA on the post-trial recommendation/addendum or having the convening authority initial and date all documents. United States v. Craig, 28 M.J. 321 (C.M.A. 1989). The CA may also consider any other appropriate matter, including matters outside the ROT. United States v. Due, 21 M.J. 431 (C.M.A. 1986). Any matter considered from outside the ROT, of which the accused is not reasonably aware and is of an adverse nature, must be disclosed to the accused to provide an opportunity for his rebuttal [R.C.M. 1107(b)(3)(B)]. United States v. Groves, 30 M.J. 811 (A.C.M.R. 1990)(Upheld SJA's argument of the accused's "probable involvement in other misconduct" as a basis for rejecting the judge's recommendation to suspend the BCD); United States v. Rich, 26 M.J. 518 (A.C.M.R. 1988)(Include any recommendations by the military judge); United States v. Heirs, 29 M.J. 68 (C.M.A. 1989)(SJA can not refer to accused's statements during improvident guilty plea).

B. Action on Findings and Sentence. Although the CA must take action on any sentence awarded, the CA is not required to review the case for legal errors or factual sufficiency. Consequently, any action taken on findings (i.e., disapproval of an LJO) is discretionary under R.C.M. 1107. United States v. McKnight, 30 M.J. 205 (C.M.A. 1990)(CA could disregard SJA's opinion that the evidence was insufficient as to a charge and its specification without stating reasons). Provided the sentence is within the jurisdiction of the court-martial and does not exceed the maximum limitations prescribed for each offense, the sentence is legal and may be approved by the CA. In the alternative, the CA may disapprove the sentence, in whole or in part, or may reduce or change the nature of the sentence so long as the sentence approved is not greater or more severe than the sentence

adjudged. The CA may reduce a mandatory sentence adjudged. United States v. Bono, 26 M.J. 240 (C.M.A. 1988)

C. Timing. The CA cannot act before the R.C.M. 1105(c) time periods have expired or submissions have been waived. The CA may not take action to approve a sentence of an accused who lacks the capacity to understand or cooperate in post-trial proceedings. If an error is discovered after action is taken, inform higher headquarters. Action by the CA is a nullity. United States v. Murphy, 26 M.J. 658 (N.M.C.M.R. 1988).

D. Mitigation. The CA may mitigate the sentence by reducing it in quantity (e.g., 4 months confinement to 2 months confinement) or by reducing it in quality (e.g., 30 days confinement to 30 days restriction). When mitigating forfeitures, the duration and amount may be changed so long as the total amount forfeited is not increased and neither the amount nor duration exceeds the limits of the jurisdiction of the court-martial.

E. Commutation. The CA may commute a sentence by changing a punishment to one of a different (less severe) nature (e.g., BCD to 6 months confinement, not 12). Waller v. Swift, 30 M.J. 139 (C.M.A. 1990).

F. Suspension. After the sentence is approved, the CA may suspend the execution of any portion of the sentence per R.C.M. 1108. This grants the accused a specified probationary period during which the suspended part of the approved sentence is not executed. The suspended sentence will be remitted, if not sooner vacated, upon completion of the specified probationary period. If the accused commits an act of misconduct during the probationary period, a hearing may be held and the suspension vacated. The procedural rules and hearing requirements are specified in R.C.M. 1109 and discussed in more detail at the end of this chapter.

G. Content of CA's Action. Appendix 16, MCM, contains sample forms of action for summary, special, and general courts-martial. Strict adherence to the forms is advised.

H. Execution of Sentence. An order executing the sentence directs that the sentence be carried out. No sentence may be executed by the CA unless and until it is approved. Once approved, every part of the sentence, except for a punitive discharge, dismissal, or death, may be executed by the CA in the initial action. A suspended sentence is approved, but not executed [R.C.M. 1113(a-b)].

1. Confinement. As with other kinds of punishments, confinement is not executed until CA's action. Nevertheless, a sentence of confinement will run from the date it is adjudged by the court, whether or not the accused is placed in post-trial confinement, unless the sentence to confinement is deferred [R.C.M. 1113(d)(2)]. Since post-trial confinement is not the result of an executed sentence, the accused may not be placed in such a status on the basis of court-martial sentence alone. A confinement order from the

commanding officer is required. This authority may be delegated to the TC [R.C.M. 1101(b)(2)]. If confinement is ordered executed, the CA shall designate the place of confinement in the action. Under JAG Manual § 0123e, the CA of a court-martial sentencing an accused to confinement is a competent authority to designate the place of temporary custody or confinement.

2. Deferment of Confinement. The accused may request a postponement of the running of a sentence to confinement. Unless the request is in writing, confinement will continue to run. The accused has the burden of showing that his interests and the interests of the community in release outweigh the community's interest in confinement. The decision to defer is a matter of command discretion; the CA may consider "the command's immediate need for the accused" and "the effect of deferment on good order and discipline in the command." The CA must specify why confinement is not deferred. Longhofer v. Hilbert, 23 M.J. 755 (A.C.M.R. 1986). The CA's written action on deferment is subject to judicial review for abuse of discretion. If the request is granted, no other form of post-trial restraint is permitted [R.C.M. 1101(c)(5)].

3. Punitive Discharge, Dismissal, and Death. A punitive discharge may be executed only by a GCMA after review is final. If more than six months have passed since the approval of the sentence by the CA, the GCMA over the accused shall consider the advice of his SJA as to whether retention of the accused would be in the best interest of the service [R.C.M. 1113(c)(1)]. Dismissal may be ordered executed only by SECNAV or his designee. Death may be ordered executed only by the President [R.C.M. 1113(c)(1-3)].

CONVENING AUTHORITY'S ACTION - ACQUITTAL RECORD OF TRIAL

LETTERHEAD

1 Feb 19CY

In the case of Boatswain's Mate Seaman Mickey E. Mouse, 123-45-5789, U.S. Navy, tried by special court-martial on 18 January 19CY, the court had jurisdiction over the accused and the offense(s) for which he was tried and the court was properly convened and constituted.

H. S. LAW
Captain, JAGC, U.S. Navy
Commanding Officer
Naval Justice School
Newport, Rhode Island

CONVENING AUTHORITY'S ACTION
(SENTENCE AWARDED AT TRIAL APPROVED AND ORDERED EXECUTED)

LETTERHEAD

1 Feb 19CY

In the case of Personnelman Third Class Mickey E. Mantel, 444-44-9944, the sentence is approved and will be executed. The Navy Brig, Naval Education and Training Center, Newport, Rhode Island, is designated as the place of confinement.

In accordance with Article 58(a), UCMJ, and JAGMAN, § 0152d(1), automatic reduction in rate to paygrade E-1 is effected.

The record of trial is forwarded to the Staff Judge Advocate, Commander, Naval Education and Training Center, Newport, Rhode Island, for review under Article 64(a), UCMJ.

H. S. LAW

Note: In this sample, the sentence does not include a punitive discharge, death or dismissal, and the paragraph pertaining to automatic reduction should be included only if the sentence awarded and approved contains confinement in excess of 90 days/3 months.

SENTENCE MODIFICATION AND PARTIAL EXECUTION. The following action shows the approval of part of the sentence and partial order of execution of the sentence awarded at trial. The convening authority only approved part of the sentence adjudged by the court. The court sentenced the accused to reduction to the grade of E-2, confinement for 120 days, forfeiture of \$200.00 pay per month for 4 months, and a bad conduct discharge. The convening authority approved the reduction to E-2 and the bad conduct discharge, but approved only 90 days of confinement and forfeitures of only \$150.00 pay per month for 3 months.

The provisions of Article 58a(a), automatic reduction, are included in this case only because the reduction awarded by the court was from E-3 to E-2. Had the court reduced the accused to E-1, and that portion of the sentence been approved and ordered executed, Article 58a(a) would no longer have been applicable.

LETTERHEAD

26 July 19CY

In the case of Yeoman Seaman John Q. Public, 111-22-3333, U.S. Navy, only so much of the sentence as provides for reduction to the grade of E-2, confinement for 90 days, forfeiture of \$150.00 pay per month for 3 months, and a bad conduct discharge is approved and, except for the part of the sentence extending to bad- conduct discharge, will be executed. The Navy Brig, Naval Education and Training Center, Newport, Rhode Island, is designated as the place of confinement.

In accordance with Article 58a(a), UCMJ and JAGMAN, § 0152d(1), automatic reduction in rate to paygrade E-1 is effected as of the date of this action.

Synopsis of the accused's prior conduct as required by JAGMAN, § 0152b:

Conviction by summary court-martial at which he was represented by lawyer counsel on 8 October 19CY(-2) for a violation of Article 121, UCMJ, wrongful appropriation of government property, for which a sentence of 1 month confinement and reduction to the grade of E-1 was finally approved. Conviction by special court-martial on 17 February 19CY(-1), for a violation of Article 86, UCMJ, unauthorized absence for a period of 27 days, for which a sentence of confinement for 1 month and forfeiture of \$50.00 pay per month for 2 months was finally approved.

In addition to the two previous convictions considered by the court in this case, the accused was awarded 15 days restriction as a result of commanding officer's nonjudicial punishment on 1 September 19CY(-2), for missing morning muster, in violation of Article 86, UCMJ.

The accused is not entitled to any awards, medals, or commendations, except the Sea Service Deployment Ribbon.

The record of trial is forwarded to the Navy-Marine Corps Appellate Review Activity (Code 40.2), Office of the Judge Advocate General, Washington Navy Yard, Washington, D.C. 20374-2002 for review under Article 66, UCMJ.

D. D. DUCK
Captain, U.S. Navy
Commander, Naval Surface Group FOUR
Newport, Rhode Island

CA'S ACTION APPROVING THE SENTENCE ADJUDGED AND
ALL BUT THE BAD-CONDUCT DISCHARGE ORDERED EXECUTED

DEPARTMENT OF THE NAVY
Naval Surface Group FOUR
Newport, Rhode Island 02841-5030

26 Jul 19CY

In the case of Yeoman Seaman John Q. Public, 111-22-3333, U.S. Navy, the sentence is approved and, except for the part of the sentence extending to bad-conduct discharge, will be executed. The Navy Brig, Naval Station, Philadelphia, Pennsylvania, is designated as the place of confinement.

In accordance with Article 58a(a), UCMJ and JAGMAN, § 0152(1), automatic reduction in rate to paygrade E-1 is effected as of the date of this action.

Synopsis of the accused's prior conduct as required by JAGMAN, § 0152b:

Conviction by special court-martial on 17 February 19CY(-1), for a violation of Article 85, UCMJ, desertion for a period of 10 days, for which a sentence of confinement for 2 months and forfeiture of \$200.00 pay per month for 2 months was finally approved.

In addition to the previous conviction considered by the court in this case, the accused was awarded 15 days restriction as a result of commanding officer's nonjudicial punishment on 5 August 19CY(-2), for missing morning muster, in violation of Article 86, UCMJ.

The accused is not entitled to any awards, medals, or commendations, except the Sea Service Deployment Ribbon.

The record of trial is forwarded to the Navy-Marine Corps Appellate Review Activity (Code 40.2), Office of the Judge Advocate General, Washington Navy Yard, Washington, D.C. 20374-2002 for review under Article 66, UCMJ.

D. D. DUCK
Captain, U.S. Navy
Commander, Naval Surface Group FOUR
Newport, Rhode Island

COMPLETED SAMPLES OF FORMS
APPENDIX 16, MANUAL FOR COURTS-MARTIAL

The court adjudged a sentence of confinement for 6 months, forfeiture of \$200.00 pay per month for 6 months, and reduction to the grade of paygrade E-1.

Form 1. Adjudged sentence approved and ordered into execution without modifications.

In the case of Yeoman Seaman John Q. Public, U.S. Navy, the sentence is approved and will be executed. The Navy Brig, Naval Education and Training Center, Newport, Rhode Island, is designated as the place of confinement.

Form 2. Adjudged sentence approved in part (modified) and ordered executed.

In the case of Yeoman Seaman John Q. Public, U.S. Navy, only so much of the sentence as provides for confinement for 3 months and reduction to the grade of E-1 is approved and will be executed. The Navy Brig, Naval Education and Training Center, Newport, Rhode Island, is designated as the place of confinement.

NOTE: Since there is no mention of the forfeiture, it was not approved and SN Public will not forfeit his money. Also, the period of confinement was reduced from 6 months to 3 months.

Form 5. Adjudged sentence approved and entire sentence suspended.

In the case of Yeoman Seaman John Q. Public, U.S. Navy, the sentence is approved. Execution of the sentence is suspended for 6 months, at which time, unless the suspension is sooner vacated, the sentence will be remitted without further action.

Form 6. Adjudged sentence approved with part of the sentence suspended.

In the case of Yeoman Seaman John Q. Public, 111-22-3333, U.S. Navy, the sentence is approved and will be executed, however, the execution of that part of sentence extending to confinement is suspended for six months, at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action.

5707

PROMULGATING ORDERS

A. After the CA acts on the findings and sentence of every SPCM or GCM, a promulgating order must be generated, normally by the SJA/LO, to enable the CA to publish the results of trial and the CA's action. The CA's action is always prepared first and then entered verbatim in the promulgating order. Any action taken on the case after the initial CA's action, e.g., to execute a discharge, shall be promulgated in supplementary orders [R.C.M. 1114; JAG Manual § 0155c].

B. The order promulgating the CA's action shall set forth: the type of court-martial and the command by which it was convened; the charges and specifications, or a summary thereof, on which the accused was arraigned; the accused's pleas; the findings or other disposition of each charge and specification; the sentence, if any; and the action of the convening authority. Samples follow; see appendix 17, MCM.

SAMPLE PROMULGATING ORDER

LETTERHEAD

26 Jul 19CY

SPECIAL COURT-MARTIAL ORDER NO. 2-CY

Yeoman Seaman John Q. Public, 111-22-3333, U.S. Navy, Naval Surface Group FOUR, Newport, Rhode Island, was arraigned at Naval Legal Service Office, Newport, Rhode Island, on the following offenses at a court-martial convened by this command.

CHARGE I: ARTICLE 86. Plea: G. Finding: G.

Specification: Unauthorized absence from his unit, USS Edson, from 4 April 19CY to his apprehension on 1 June 19CY. Plea: G. Finding: G.

CHARGE II: ARTICLE 121. Plea: G. Finding: G.

Specification: Larceny of a radio of a value of about \$125.00, the property of Fireman Stoke T. Coals, U.S. Navy. Plea: G. Finding: G.

SENTENCE

Sentence adjudged on 15 June 19CY: To be reduced to the grade of E-2, to be confined for 120 days, to forfeit \$200.00 pay per month for 4 months, and to be discharged from the naval service with a bad-conduct discharge.

ACTION

LETTERHEAD

26 Jul 19CY

In the case of Yeoman Seaman John Q. Public, 111-22-3333, U.S. Navy, only so much of the sentence as provides for reduction to the grade of E-2, confinement for 90 days, forfeiture of \$150.00 pay per month for 3 months, and a bad-conduct discharge is approved and, except for the part of the sentence extending to bad-conduct discharge, will be executed. The Navy Brig, Naval Education and Training Center, Newport, Rhode Island, is designated as the place of confinement.

In accordance with Article 58a(a), UCMJ and JAGMAN, § 0152d(1), automatic reduction in rate to paygrade E-1 is effected as of the date of this action.

Synopsis of the accused's prior conduct as required by JAGMAN, § 0152b:

Conviction by summary court-martial at which he was represented by lawyer counsel on 8 October 19CY(-2) for a violation of Article 121, UCMJ, wrongful appropriation of government property, for which a sentence of 1 month confinement and reduction to the grade of E-1 was finally approved. Conviction by special court-martial on 17 February 19CY(-1), for a violation of Article 86, UCMJ, unauthorized absence for a period of 27 days, for which a sentence of confinement for 1 month and forfeiture of \$50.00 pay per month for 2 months was finally approved.

In addition to the two previous convictions considered by the court in this case, the accused was awarded 15 days restriction as a result of commanding officer's nonjudicial punishment on 1 September 19CY(-2), for missing morning muster, in violation of Article 86, UCMJ.

The accused is not entitled to any awards, medals, or commendations, except the Sea Service Deployment Ribbon.

The record of trial is forwarded to the Navy-Marine Corps Appellate Review Activity (Code 40.2), Office of the Judge Advocate General, Washington Navy Yard, Washington, D.C. 20374-2002 for review under Article 66, UCMJ.

/s/ D. D. Duck
D. D. DUCK
Captain, U.S. Navy
Commander, Naval Surface Group FOUR
Newport, Rhode Island

R. U. GUILTY
Lieutenant Commander, JAGC, U.S. Navy
Staff Judge Advocate
Naval Surface Group FOUR
Newport, Rhode Island
By direction of D. D. Duck
Captain, U.S. Navy
Commander, Naval Surface Group FOUR
Newport, Rhode Island

Distribution:

Original - Original ROT

Duplicate Original - Accused's SRB

Certified Copies - 3 to original ROT

1 to each copy ROT

2 to COMNAVSURFGRU FOUR Newport, RI

1 to COMNAVMILPERSCOM (NMPC-8)

1 to COMNAVSURFGRU FOUR Newport, RI (OEGCMJ)

1 to COMNAVSURFLANT Norfolk, VA

1 to PRESNAVCLEMPARBD

Plain Copies -

1 to accused

1 to NAVLEGSVCOFF Newport, RI

1 to MJ

1 to TC

1 to DC

1 COMNAVSURFGRU FOUR Newport, RI

1 to USS EDSON (DD 946)

1 to USS SAMUEL B. ROBERTS (FFG 58)

1 to USS SIMPSON (FFG 56)

DEPARTMENT OF THE NAVY
Naval Surface Group FOUR
Newport, Rhode Island 02841-5061

SUPPLEMENTAL COURT-MARTIAL ORDER NO. 2A-CY

In the special court-martial case of Yeoman Seaman John Q. Public, 111-22-3333, U.S. Navy, the sentence to bad-conduct discharge, as promulgated in Special Court-Martial Order No. 2-CY, Commander, Naval Surface Group FOUR, Newport, Rhode Island, dated 26 Jul 19CY, has been affirmed by the Navy-Marine Corps Court of Military Review, NMCM CY 5464, dated 23 April 19CY(+1). Article 71(c) having been complied with, the bad-conduct discharge will be executed.

T. H. JUDGE
Lieutenant Commander, JAGC, U.S.N.
Naval Surface Group FOUR
Newport, Rhode Island
By direction of D. D. Duck
Captain, U.S. Navy
Commander, Naval Surface Group FOUR
Newport, Rhode Island

Distribution:

Original - Original ROT

Duplicate Original - Accused's SRB

Certified Copies - 3 to original ROT

1 to each copy ROT

2 to COMNAVSURFGRU FOUR Newport, RI

1 to COMNAVMILPERSCOM (NMPC-8)

1 to COMNAVSURFGRU FOUR Newport, RI (OEGCMJ)

1 to COMNAVSURFLANT Norfolk, VA

1 to PRESNAVCLEMPARBD

Plain Copies - 1 to accused

1 to NAVLEGSVCOFF Newport, RI

1 to MJ

1 to TC

1 to DC

1 COMNAVSURFGRU FOUR Newport, RI

1 to USS EDSON (DD 946)

1 to USS SAMUEL B. ROBERTS (FFG 58)

1 to USS

1 to SIMPSON (FFG 56)

ACKNOWLEDGEMENT OF SERVICEPER R.C.M. 1106(f)

I hereby acknowledge receipt of a certified true copy of the Article 60(d), UCMJ, recommendation in the Special Court-Martial case of _____, USN, SSN, at _____, hours, this _____ day of _____, 1991.

I understand I have ten (10) days to submit to the Staff Judge Advocate, Commander _____, written corrections or rebuttal to any matter in her recommendation which is believed to be erroneous, inadequate, or misleading, or to comment on any other matter. I further understand that any requests for delay in submitting my comments must be in writing and addressed to Commander _____, via the Staff Judge Advocate.

I do/do not desire to submit a written statement.

LT, JAGC, USNR
DEFENSE COUNSEL

RECEIPT FOR COURT-MARTIAL PROMULGATING ORDER
BY ACCUSED/DEFENSE COUNSEL OR CIVILIAN DEFENSE COUNSEL

ACKNOWLEDGEMENT OF SERVICEPER R.C.M. 1107(h)

I hereby acknowledge receipt of two copies of the Court-Martial Promulgating Order in the Special Court-Martial case of _____ USN, SSN, at _____ hours, this _____ day of _____ 1991.

NAME
LT, JAGC, USNR
DEFENSE COUNSEL

5708 **SUBSEQUENT REVIEW OF ROT.** The ROT of every court-martial is reviewed by higher authority.

A. SCMs and non-BCD SPCMs [R.C.M. 1112, 1201(b)(2); JAG Manual § 0153]. A written review of these cases will be conducted by a judge advocate (JA) who is, in most instances, the SJA to the GCMA and has not been disqualified by acting in the same case as accuser, investigating officer, member, military judge, counsel, or otherwise on behalf of the prosecution or defense. The review will address jurisdiction over the accused, whether each guilty finding is based on a specification which states an offense, and whether the sentence is legal. The JA will also respond to each allegation of error made in writing by the accused. Generally, review of SCM's and non-BCD SPCM's is final when the JA completes his review. If corrective action is recommended, however, a statement as to appropriate action, and an opinion as to whether corrective action is required as a matter of law, will be forwarded with the ROT to the GCMA for action. When the JA states that corrective action is required as a matter of law, and the GCMA fails to take action at least as favorable to the accused as that recommended by the JA, the ROT shall be forwarded to the Judge Advocate General (JAG) for resolution.

B. BCD SPCMs [Arts. 66, 67, UCMJ; R.C.M. 1111, 1201-1205]. If appellate review has not been waived, all SPCMs, including a BCD--whether suspended or not--will be sent directly to JAG upon completion of LO/SJA recommendation and CA action on the ROT. [JAG Manual § 0153b(1)(b)]. After detailing appellate defense and government counsel, JAG will refer the case to the N.M.C.M.R. N.M.C.M.R. will review the case and may make findings of fact and law. After N.M.C.M.R. review, the case may be reviewed, for errors in law only, by C.M.A., if certified by JAG or if C.M.A. grants the accused's petition for review. Finally, review by the Supreme Court of the United States is possible under 28 U.S.C. § 1259, Art. 67(a) (newly amended) and Art. 67(h), UCMJ (R.C.M. 1205). On the other hand, if the accused executes a written waiver of appellate review, a written review by a JA will be required similar to the review required in SCM/non-BCD SPCM cases. In the case of a BCD SPCM, however, the ROT and review must always be sent to the GCMA for final action.

C. GCMs [Articles 66, 67, 69, UCMJ; R.C.M. 1111, 1201, 1203-1205]. All GCM cases in which the sentence as approved includes a dismissal, a punitive discharge, or confinement of at least one year will be forwarded to JAG and reviewed in precisely the same way as a BCD SPCM. Cases involving death sentences are reviewed in a similar fashion, except that review by C.M.A. is mandatory. Other GCM cases (i.e., those not involving death, dismissal, punitive discharge, or confinement of one year or more) are reviewed by JAG under Art. 69(a), UCMJ, and R.C.M. 1201(b). JAG may modify or set aside the findings or sentence, or both, if any part of the findings or sentence are found to be insupportable in law or if reassessment of the sentence is appropriate. As an alternative

measure, JAG may forward the case for review to N.M.C.M.R. In this latter case, however, no further review by C.M.A. is possible unless the JAG so directs. Lastly, if the accused waives appellate review, written review by a JA is required. The ROT and the JA review must be sent to the GCMA for final action if corrective action is recommended or if the sentence includes dismissal, discharge, or confinement for greater than six months (R.C.M. 1112). There can be no waiver of appellate review in cases in which the approved sentence includes death [R.C.M. 1110].

5709 **ARTICLE 69(b) REVIEW IN OJAG [R.C.M. 1201(b)(3); JAG Manual § 0162]**

A. The findings or sentence, or both, in a court-martial case that has been finally reviewed (e.g., summary, special, or general court-martial reviewed by JA and acted upon by GCMA under R.C.M. 1112), but has not been reviewed by N.M.C.M.R., may be vacated or modified by JAG on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

B. If the accused is still on active duty, the application for relief must be submitted via the commanding officer, the command that convened the court, and the GCMA that reviewed the case under Article 64(a) or (b), UCMJ [R.C.M. 1112]. The SJA/LO attached to these commands will most likely be responsible for drafting the requisite endorsements on the application. The endorsement shall include, among other things, information and specific comment on the grounds for relief and an opinion on the merits of the application [JAG Manual § 0153c]. If the accused is no longer on active duty, the application may be submitted directly to JAG.

C. The application must be placed in military channels if the applicant is on active duty, or be deposited in the mail if the accused is no longer on active duty, not more than two years after the CA approved the sentence.

D. Article 69, UCMJ, has been amended to permit JAG to certify cases to N.M.C.M.R. when the sentence is not subject to automatic review. This could result in N.M.C.M.R. scrutinizing the decisions and JA's review of summary courts-martial, non-BCD SPCMs and BCD SPCMs, and GCMs where appellate review has been waived.

5710 **WAIVER OR WITHDRAWAL OF APPELLATE REVIEW UNDER R.C.M. 1110**

A. After any general court-martial, except one in which the approved sentence includes death, and after any special court-martial in which the approved sentence includes a bad conduct discharge the accused may elect to waive appellate review.

B. The accused has the right to consult with counsel before submitting a waiver or withdrawal. The waiver must be in writing, attached to record of trial, and filed with the convening authority. The written statement must include: statement that accused and counsel have discussed accused's appellate rights and the effect of waiver or withdrawal on those rights ; that accused understands these matters; that the waiver or withdrawal is submitted voluntarily; and be signed by accused and counsel. Appendix 19 and 20, MCM, 1984.

C. The accused may only file a waiver within 10 days after the accused or DC is served with a copy of the CA's action. The accused may file a withdrawal at any time before appellate review is completed. Once filed in substantial compliance with the rules, the waiver or withdrawal may not be revoked. C.M.R. is not required to grant a motion to withdraw. Instead, once a record of trial has been properly referred to a Court for review it is, then, within the sound discretion of that Court whether the record should be withdrawn pursuant to Article 61, UCMJ. United States v. Ross, 32 M.J. 715 (C.G.C.M.R. 1991).

5711 **RELEASE FROM CONFINEMENT PENDENTE LITE.** Under the All Writs Act, 28 U.S.C. 1651, C.M.R.s and C.M.A. have the authority to order deferment of confinement pending completion of appellate review. If the accused has won a "favorable decision" from C.M.R. and "the situation is one in which the Government could establish a basis for pretrial confinement (see R.C.M. 305), then it should have the opportunity to show why the accused should be kept in confinement pending the completion of appellate review. This can best be handled by ordering a hearing before a military judge or special master for a determination similar to that for pretrial confinement. Moore v. Akins, 30 M.J. 249 (C.M.A. 1990).

5712 POST-TRIAL PROCESSING TIME

A. Local Delay. From sentence to action, unreasonable delay will be tested for prejudice. United States v. Clevidence, 14 M.J. 17 (C.M.A. 1982) (Findings and sentence set aside when accused demonstrated that he had been specifically prejudiced in the pursuit of civilian employment during 313-day delay).

B. Appellate Delay. Delay in the administrative handling and forwarding of the ROT to an appellate court was recently examined in United States v. Dunbar, 31 M.J. 70 (C.M.A. 1990) ("Appellant's case has languished for 1097 days in post-trial appellate limbo without explanation"). Chief Judge Everett's lead opinion identified concern for a claim of prejudice other than that which might inure to an accused at his rehearing or new trial ordered to remedy prejudicial error discovered on appeal. In cases involving "relative nonserious offenses," the court would grant relief if the accused demonstrates that inexcusable delay in ministerial handling of a record caused him personal suffering apart

from that flowing from the conviction. Judge Cox, concurring in the result, preferred the test applied in United States v. Green, 4 M.J. 203 (C.M.A. 1978) (After the CA's action, the case is at the appellate level; dismissal of the charges is appropriate only when some error in the trial proceedings requires a rehearing, appellant would be prejudiced at a rehearing because of the delay, and no useful purpose would be served by continuing the proceedings).

5713 **NEW TRIAL** [Art. 73, UCMJ; R.C.M. 1210; JAG Manual § 0163]

A. Petition. An accused can petition JAG for a new trial (trial de novo), even after his conviction has become final, by completion of appellate review. JAG must receive the petition within two years after approval by the CA of the court-martial sentence.

B. Grounds. There are only two grounds for petition: newly discovered evidence and fraud on the court. To be considered newly discovered, the evidence must have been discovered after the first trial and petitioner must have exercised due diligence to discover it if its existence could have been known at the time of the first trial. Sufficient grounds will be found to exist only if it is established that an injustice has resulted from the findings or sentence and that a new trial would produce a result substantially more favorable to the accused.

5714 **GOVERNMENT RIGHT TO APPEAL** [Art. 62, UCMJ; R.C.M. 908; JAGINST 5810.2]. In any case over which a military judge presides, and in which a punitive discharge may be adjudged, the government may appeal a ruling which terminates the proceedings with regard to a charge or specification or which excludes evidence of a fact material in the proceedings. The government, however, may not appeal a ruling that amounts to a finding of not guilty.

A. TC Decision. After an order or ruling which is subject to appeal by the United States, as described above, the trial may not proceed as to the affected specification if the TC requests a delay to decide whether to appeal. The TC has 72 hours in which to make this decision [R.C.M. 908(b)].

B. Notice of Appeal. After coordinating with the Director, Appellate Government Division, Navy-Marine Corp Appellate Review Activity, trial counsel may file a notice of appeal (para 5.a of JAGINST 5810.2). The notice of appeal is a written document identifying the ruling or order to be appealed and the charges or specifications affected. The notice of appeal should also include a certification signed by trial counsel that the appeal is not taken for the purpose of delay and, if the order or ruling appealed is one which excludes evidence, that the evidence excluded is substantial proof of a fact material to the proceeding.

C. Documentation. The following documents must be forwarded to the Director, Appellate Government Division, Navy-Marine Corps Appellate Review Activity, who shall make the final decision as to whether the appeal shall be pursued:

1. The notice of appeal filed by the TC;
2. an appeal substantially in the form provided in the Rules of Practice and Procedure of the Court of Military Review (see 10 M.J.), including:
 - a. A summary of the proceedings;
 - b. a statement of facts which were decided by the military judge with respect to the error assigned [N.M.C.M.R. will be bound by the judge's findings of fact];
 - c. the error assigned, followed by an argument supporting the government's position on each error; and
 - d. the specific relief requested.
3. an authenticated record of the portion of the trial dealing with the error alleged; and
4. a letter of justification from the TC indicating why the appeal is being taken and describing the anticipated consequences should the military judge's position be upheld [JAG Manual § 0131].

D. N.M.C.M.R. Action. Both parties will be represented by appellate counsel before N.M.C.M.R. The appeal will have priority over all other proceedings before the court. Unlike its normal scope of review, N.M.C.M.R. may take action on the appeal only with respect to matters of law [R.C.M. 908(c)]. The accused may petition a contrary ruling of N.M.C.M.R. to C.M.A. within 60 days of receiving notification of the ruling. JAG may certify a contrary ruling to C.M.A. [R.C.M. 908(c)]. Either the accused or the government may seek review by the Supreme Court [R.C.M. 1205].

5715 VACATION OF SUSPENDED SENTENCES UNDER R.C.M.

1109. The rule sets forth the procedural and substantive requirements for vacating a suspended sentence. DD Form 455 guides the hearing. A sample is reproduced in Appendix 18, MCM, 1984. The accused may be confined pending the decision to vacate the suspended sentence. Unless the proceedings are completed within 7 days, a preliminary hearing must be held by an independent officer to determine whether there is probable cause to believe that the accused has violated the conditions of the suspension. The commencement of the

proceedings to vacate the suspension interrupts the running of the period of suspension. The hearing (to vacate a suspended GCM or SPCM with BCD sentence) must be conducted personally by the officer exercising special/summary court-martial jurisdiction over the probationer. The hearing officer's recommendation is forwarded to the GCMA over the probationer, who decides whether to vacate the suspension. To vacate a suspended SCM or SPCM sentence, the officer exercising SCM/SPCM jurisdiction over the probationer shall cause a hearing to be held, and after which shall determine whether to vacate the suspension. Vacation of a suspension must be based upon a violation of a condition that occurs during the period of the suspension. United States v. Schwab, 30 M.J. 842 (N.M.C.M.R. 1990). The convening authority and the accused can agree that vacation of a suspended sentence may be based upon misconduct that occurs post-trial but prior to action. United States v. Kendra, 31 M.J. 846 (N.M.C.M.R. 1990).

PROCEDURES FOR VACATION OF SUSPENDED SENTENCES

5716 **PAROLE.** You may have heard judges announce sentences which included confinement "for one year and one day." The strange sentencing provision was actually a requirement for parole eligibility. Until recently, long-term confinees were not eligible for parole unless their sentences included "confinement for more than one year." The extra day of confinement is no longer required for parole eligibility under paragraph 3b(1)(b) of DoD Directive 1325.4, Confinement of Military Prisoners and Administration of Military Correctional Programs and Facilities, 19 May 1988. To be eligible under the new DoD Directive, the member must have an unsuspended punitive discharge or dismissal, administrative discharge, or retirement. See also SECNAVINST 5815.3. Members are now eligible for parole as follows:

- A. If sentenced to confinement for 12 to 18 months, the member becomes eligible after serving six months;
- B. If sentenced to confinement for 18 months to 30 years, the member becomes eligible after serving one-third of the sentence; and
- C. If the sentenced to confinement for 30 years or more, or for life, the member is eligible after serving 10 years.

5717 CHECKLIST FOR POST-TRIAL MATTERS

A. Navy

1. If accused will be confined for more than 30 days after trial, or a BCD and any confinement is adjudged, prepare TEMDU orders and deliver to the brig. These will cancel the previously issued TEMADD. See MILPERSMAN 1850300 and BUPERS Instruction 1640.17 (series).
2. After receipt of a copy of the record of trial, ensure that one copy is served on the accused. Note: This may be done by the NLSO, so check their normal procedure.
3. Prepare the legal officer's recommendation in accordance with R.C.M. 1106.
4. Serve a copy of the recommendation on the DC.
5. Prior to preparing the CA's action, ensure that the time limits for the accused's response [R.C.M. 1105(c)] and the DC's response have elapsed [R.C.M. 1106(f)(5)].

6. After receiving all responses in accordance with R.C.M. 1105 and 1106, forward the ROT, your recommendation, and the responses to the CA for review.
7. Find out what action the CA wants to take on the record of trial and prepare the CA's action accordingly.
8. After the action is signed by the CA, attach it along with all deferment requests, requests for clemency, or other matters submitted by the accused or DC to the ROT. (See JAG Manual § 0153.)
9. Prepare the promulgating order and make appropriate copies for distribution, including copies for the record. See JAG Manual § 0155 regarding distribution of the promulgating order.
10. Prepare the court-martial data report form (JAG Manual § 0148b) and attach to the original ROT. Complete the necessary times sheet from OPNAVINST 5510.4 and the back of the cover of the original ROT. Forward the record per JAG Manual § 0153.
11. If the service record is held by the command, prepare the appropriate service record entries. These will normally be pages 4, 7, 9, and 13.
12. Ensure that the command has retained a complete copy of the ROT, CA's action, and the promulgating order.
13. Upon completion of any adjudged confinement, prepare a page 7 to indicate lost time.
14. In non-BCD cases, upon receipt of the judge advocate review, make an appropriate page 13 entry.

B. General Confinement Issues

1. A confinement order (with three copies) should be completed prior to trial. The charges of which convicted and the sentence adjudged should be left for the trial counsel to complete. The order should be presigned at the command, or permission should be given to the trial counsel to sign "by direction." (Note: Some NLSOs do not want a trial counsel to sign the orders on their own authority as commissioned officers and, therefore, prefer the "by direction" authority be granted.)

2. The medical, dental, pay, and service records must be sent to the brig. The NLSO will have the service record, but the command should collect the others and hold them until the end of the trial. If confinement is less than 30 days, the pay record will not be needed; but you should obtain it just in case more lengthy confinement is adjudged.
3. Prepare 30-day TEMADD orders for the accused. Give these to the bailiff also. If the accused will be confined for greater than 30 days after trial, or a BCD/DD and any confinement is adjudged, TEMDU orders will be needed. To save time after trial, however, the TEMADD orders will suffice initially and they can be canceled by the TEMDU orders the next day after trial.
4. A NAVPERS 3067 will be needed to obtain the member's pay record. If confinement is less than 30 days, the pay record may not be needed.
5. Comply with BUPERS Instruction 1640.17C concerning designation/redesignation of places of confinement.
6. Note: If your command is a deploying unit and the member will be confined for more than 30 days, you may not have to take the member back after confinement. Check with your personnel or administrative officer. MILPERSMAN 1850300.

D. Confinement on Bread and Water/Diminished Rations. Held unconstitutional as a court-martial punishment. United States v. Valeod, 32 M.J. 122 (C.M.A. 1991).

E. Marine Corps

1. Ensure confinement order is completed, any deferral request is acted on, accused has proper uniforms, and escort to brig.
2. Upon receipt of copy of record of trial, ensure accused is served a copy.
3. Ensure the CA does not act on the record until all responses under R.C.M. 1105 and 1106 are received for the CA's action.
4. After the CA has acted, attach action to the ROT and return to Law Center/LSSS for review. Ensure the command has a complete copy.
5. Complete appropriate section of page 13, SRB and appropriate SRB pages.
6. Upon receipt of promulgating order, insert in the ROT.

7. Upon completion of confinement, enter time lost on page 5, SRB.

5718 POST-TRIAL REVIEW CASES

A. Clemency Requests. United States v. Craig, 28 M.J. 321 (C.M.A. 1989); United States v. Hallum, 26 M.J. 838 (A.C.M.R. 1988).

B. SJA/LO Recommendation

1. General. United States v. Curry, 28 M.J. 419 (C.M.A. 1989); United States v. Hill, 27 M.J. 293 (C.M.A. 1988); United States v. Allen, 28 M.J. 610 (N.M.C.M.R. 1989); United States v. Hein, 29 M.J. 68 (C.M.A. 1989); United States v. Groves, 30 M.J. 811 (A.C.M.R. 1990).

2. Service on DC. United States v. Sprenkle, No. 91-0309 (N.M.C.M.R. Apr. 16, 1991); United States v. Haliday, No. 90-2891 (N.M.C.M.R. Dec. 8, 1990).

3. Forwarded to DC instead of Accused. United States v. Roland, 31 M.J. 747 (A.C.M.R. 1990); United States v. Diaz-Carrero, 31 M.J. 920 (A.C.M.R. 1990); United States v. Davis, No. 91-0071 (N.M.C.M.R. Apr. 29, 1991); United States v. Rhynes, No. 91-2886 (N.M.C.M.R. Mar. 29, 1991).

4. Comment on legal error. United States v. O'Connor, No. 89-3294 (N.M.C.M.R. June 29, 1990); United States v. Coty, No. 90-0919 (N.M.C.M.R. Dec. 4, 1990).

5. 10 days to Comment on SJA Recommendation. United States v. Bjerke, No. 90-2798 (N.M.C.M.R. Feb. 28, 1991).

6. CA's Action Prior to SJA Recommendation. United States v. Dunbar, 28 M.J. 972 (N.M.C.M.R. 1989), aff'd, 31 M.J. 70 (C.M.A. 1990).

C. CA's Action

1. Substitute CA. United States v. McGuire, No. 90-0868 (N.M.C.M.R. Dec. 27, 1990); United States v. Snodgrass, No. 90-1870 (N.M.C.M.R. Jan. 22, 1991).

2. Supplemental Action. United States v. Klump, No. 90-2840 (N.M.C.M.R. Jan. 22, 1991).

3. Suspension of Expired Confinement. United States v. Lamb, 22 M.J. 518 (N.M.C.M.R. 1986); United States v. Wood, No. 90-2582 (N.M.C.M.R. Nov. 16, 1990); United States v. Carter, No. 90-2922 (N.M.C.M.R. Jan. 14, 1991).

4. Vacation of Suspended Sentence. United States v. Jenkins, 30 M.J. 1101 (N.M.C.M.R. 1989); United States v. Schwab, 30 M.J. 842 (N.M.C.M.R. 1990); United States v. Kendra, 31 M.J. 846 (N.M.C.M.R. 1990).

5. Execution of Sentence. United States v. Valead, 30 M.J. 634 (N.M.C.M.R. 1988) aff'd, 32 M.J. 122 (C.M.A. 1990).

D. Unreasonable Delay in Appellate Process. United States v. Dunbar, 31 M.J. 70 (C.M.A. 1990).

E. Verbatim Transcript. United States v. McCallum, 31 M.J. 882 (N.M.C.M.R. 1990); United States v. Alston, 30 M.J. 969 (N.M.C.M.R. 1990); United States v. Butler, No. 90-2536 (N.M.C.M.R. Feb. 11, 1991).

5719 **IMPACT OF A PUNITIVE DISCHARGE ON BENEFITS**

A. VA Benefits. Members who receive a punitive discharge face the potential loss of various federal benefits, such as Veterans' Administration disability benefits. Would-be "BCD Strikers" should be advised that a punitive discharge could severely limit the extent of VA benefits they will be eligible to receive. The VA does have a procedure by which, on a case by case basis, benefits can be awarded to an applicant who has received a discharge under less than honorable conditions. However, this procedure is typically used for short-term UAs and relatively minor offenses; it rarely is employed for more serious offenses. The statutory limits on the VA's ability to grant benefits notwithstanding a negative discharge are enumerated in 38 U.S.C. § 3103. Social Security disability remains an option, regardless of the character of discharge, even though Veterans' disability may not be available.

B. Employment Only members who leave the service with an honorable or general discharge may claim a veteran's preference when applying for federal employment. Depending on the nature of the underlying offense, a convicted member may be completely disqualified from holding many federal jobs. In addition, members who contemplate requesting punitive discharges (or waiving their right to an administrative discharge board hearing) should be aware that receiving a punitive or OTH discharge may adversely affect their eligibility for state benefits as well.

C. "Tower Amendment." Formerly, servicemembers with over twenty years of active duty were guaranteed that when they retired or transferred into the Fleet Reserve, their entitlement to retired/retainer pay would not be reduced from the highest level attained, even if they were later reduced in rate. This provision had the unintended effect of protecting undeserving servicemembers who were reduced by not punitively separated at court-martial. Congress recently modified 10 U.S.C. § 1401f to provide that a member reduced in rate by court-martial will receive retired/retainer pay based only on the actual grade at retirement/Fleet Reserve transfer. The change affects only those servicemembers who initially become eligible for retired or retainer pay on or after 1 October 1988. Those who became eligible before 1 October 1988 will continue to benefit from the "guarantee" of the prior law.

5720 NAVY PAGES 7 AND 13 ENTRIES. Page 7 entries are required in the Navy in all cases where the sentence, as approved and ordered executed by the CA, includes confinement, reduction in rate, forfeiture of pay, or fine. (In addition, in the case of reduction, a Page 4 entry is required.)

A. Procedure. If all of the above types of punishments have been suspended by the CA, then a Page 7 entry will not be prepared. Instead, a Page 13 entry will be required. If any one of the above-mentioned types of punishments has been approved and not suspended, however, then a Page 7 entry must be prepared to reflect the results of the court-martial.

B. Vacation. In addition, in the event that a sentence which normally would have been documented on a Page 7 entry was suspended (so a Page 13 entry was initially completed) and the CA later vacates that suspended sentence, then preparation of a Page 7 entry will be required at the time the suspended sentence is vacated. This entry will reflect which portion of the suspended sentence has been vacated and thus "ordered executed."

SAMPLE ADMINISTRATIVE REMARKS
(SENTENCE DOES NOT INCLUDE CONFINEMENT OR AFFECT PAY)

ADMINISTRATIVE REMARKS
NAVPERS 1070/613 (Rev. 1-76)
S/N 0106-LF-010-6990

SHIP OR STATION
USS IOWA (BB 61)

3 Feb CY: SPECIAL COURT-MARTIAL

DATE OF OFFENSE: 23 September 19-1

NATURE OF OFFENSE: Violation of UCMJ, Article 86 -unauthorized
absence from 23 September 19-1 to 7 January
19CY

DATE OF TRIAL: 10 January 19CY

FINDINGS: Of the Charge and the Specification
thereunder: Guilty

SENTENCE ADJUDGED: To be restricted to the limits of USS IOWA
(BB61) for a period of 45 days.

CA's ACTION ON SENTENCE: Approved and ordered executed. The
record of trial is forwarded to
Commander, Naval Surface Force, U.S.
Atlantic Fleet, Norfolk, Virginia, for
review per Article 64(b), UCMJ.

/signature/
J. L. MASTERSON, PNCS, USN
By direction of the Commanding Officer

<u>NAME</u>	<u>SSN</u>	<u>BRANCH AND</u>
<u>CLASS</u>		
BYERS, Thomas Glenn	987-65-4321	USN

SAMPLE "PAGE 7" COURT MEMORANDUM (P601-7R)
SPECIAL COURT-MARTIAL CONVICTION

[Blocks not identified are left blank.]

1. DATE SUBMITTED: CYMAR22 2. SHIP/STATION: USS IOWA (BB 61)
3. DATE OF REFERRAL: CYFEB16 4. TYPE OF COURT: SPECIAL
5. DATE OF COURT: CYFEB28 6. UCMJ ARTICLE(S): 128, 134
7. DATE OF ACTION: CYMAR20 8. "X" REPORT OF ACTION
12. "X" RATE ADJUSTMENT
13. FROM: BT3 14. TO: BTFN 15. TIR: CYMAR20
42. SYNOPSIS . . .

CYMAR22: SPECIAL COURT-MARTIAL

DATE OF TRIAL: CYFEB28

VIOL UCMJ ART. 128 - ASSAULT ON A PETTY OFFICER BY STRIKING HIM IN THE FACE WITH HIS FIST ON CYFEB10; VIOL UCMJ, ART. 134 - DRUNK AND DISORDERLY CONDUCT ON STATION ON CYFEB10.

SENTENCE ADJUDGED: CONF FOR 2 MONTHS AND REDUCTION IN GRADE TO PAY GRADE E-3

DATE SENTENCE ADJUDGED: CYFEB28

43. 1070/607 DTD: CYMAR20 44. AUTHORITY TYPE: CONVENING

45. CO USS IOWA (BB 61) LTR SER 325 DTD CYMAR20 FWD ROT TO COMNAVSURLANT, NORFOLK, VA

CA'S ACTION: APPROVED AND ORDERED EXECUTED. THE NAVAL BRIG, NAVSTA, NORFOLK, VA, IS DESIGNATED THE PLACE OF CONF. ROT FWD TO COMNAVSURFLANT, NORFOLK, VA FOR REVIEW PER ART. 64(a), UCMJ.

[Complete blocks 46-51 with identifying data.]

SAMPLE "PAGE 7" COURT MEMORANDUM (P601-7R)
SPECIAL COURT-MARTIAL SENTENCE SERVED

[Blocks not identified are left blank.]

1. DATE SUBMITTED: CYAPR20
 2. SHIP/STATION: USS IOWA (BB 61)
 3. DATE OF REFERRAL: CYFEB16
 4. TYPE OF COURT: SPECIAL
 5. DATE OF COURT: CYFEB28
 6. UCMJ ARTICLE(S): 128, 134
 7. DATE OF ACTION: CYAPR19
 8. "X" REPORT OF ACTION
 36. CONFINEMENT ORDERED FROM: CYFEB28
 37. COMPUTED TO CYAPR19
 38. DAYS LOST TIME (30 DAY BASIS): 51
 39. DAYS LOST TIME (DAY FOR DAY): 50
 40. CHANGE EAOS TO: CY+1SEP25
 41. CHANGE EXP. ENL. TO: CY+1SEP25
 42. SYNOPSIS . . .
- RELEASED FROM CONF. HAVING SERVED 50 DAYS OF SENTENCE ADJUDGED ON CYFEB28. GIVEN 10 DAYS CREDIT FOR GOOD BEHAVIOR.
44. AUTHORITY TYPE: ADMINISTRATIVE
 46. J. L. MASTERSON, PNCS, USN, BY DIR OF CO USS IOWA (BB 61)

[Complete blocks 47-51 with identifying data.]

SPECIAL COURT-MARTIAL PUNISHMENT CHART

GENERAL COURT-MARTIAL PUNISHMENT CHART

GENERAL COURT-MARTIAL PUNISHMENT CHART
(CONTINUED)

5721 CASES ON COURT-MARTIAL PUNISHMENTS

A. Ultimate Offense Doctrine. United States v. Battle, 27 M.J. 781 (A.F.C.M.R. 1988).

B. Death. United States v. Curtis, 32 M.J. 252 (N.M.C.M.R. 1991); United States v. Dock, 28 M.J. 117 (C.M.A. 1989).

C. Discharge. United States v. Leonard, 27 M.J. 739 (A.C.M.R. 1988); United States v. Harry, 25 M.J. 513 (A.F.C.M.R. 1987)(Commutation of BCD to 12 months confinement unauthorized; BCD to 6 months confinement authorized); Waller v. Wift, 30 M.J. 139 (C.M.R. 1990)(DD commuted to 18 months confinement); United States v. Coleman, 31 M.J. 653 (C.G.C.M.R. 1990).

D. Confinement. United States v. Allen, 17 M.J. 126 (C.M.A. 1984); United States v. Pierce, 27 M.J. 367 (C.M.A. 89).

E. Confinement to Enforce Fines. United States v. Rascoe, 31 M.J. 544 (N.M.C.M.R. 1990); United States v. Brooks, 32 M.J. 831 (N.M.C.M.R. 1991).

F. Forfeitures. United States v. Warner, 25 M.J. 64 (C.M.A. 1987); United States v. Gonda, 27 M.J. 636 (A.C.M.R. 1988); United States v. Frierson, 28 M.J. 501 (A.F.C.M.R. 1989); United States v. Murphy, 28 M.J. 758 (A.F.C.M.R. 89); United States v. Bowen, 29 M.J. 779 (A.C.M.R. 1989); United States v. Petty, 30 M.J. 1237 (A.C.M.R. 1990); United States v. Deisher, 32 M.J. 579 (A.F.C.M.R. 1990).

G. Fines. United States v. Shada, 28 M.J. 684 (A.F.C.M.R. 1989); United States v. Czeck, 28 M.J. 563 (N.M.C.M.R. 1989), pet. den., 29 M.J. 275 (C.M.A. 1989); United States v. Harris, 19 M.J. 331 (C.M.A. 1985); United States v. Soriano, 22 M.J. 453 (C.M.A. 1986); United States v. Morales-Santana, 32 M.J. 557 (A.C.M.R. 1990).

H. Article 58a Administrative Reduction. United States v. Young, 24 M.J. 626 (A.C.M.R. 1987).

I. Reconsideration of sentence. United States v. Jones, 3 M.J. 348 (C.M.R. 1977); United States v. Feld, 27 M.J. 537 (A.F.C.M.R. 1988).

5722 FREQUENT ERRORS IN THE SUBMISSION OF RECORDS OF TRIAL

A. NAMARA Observations. The Documents Examination Section (Code 40.31) of the Case Management Branch, Administrative Support Division, NAMARA receives and processes more than 5,000 records of trial (ROT) each year. Upon receipt, these cases are examined for completeness before being forwarded for review to the NMCMR, under article 66, UCMJ; or to New Trials/Examination under articles 69 and 73, UCMJ; or filed after waiver of appellate review under article 64, UCMJ. Approximately 20 percent of all cases submitted to NAMARA for review contain errors in post-trial documents, notably the court-martial order. In at least 10 percent of the cases submitted, appellate processing is delayed because the records are incomplete or improperly forwarded. R.C.M. 1103 provides instructions on preparation of the ROT and specifies the documents to be included and attached.

B. Article 66. For cases submitted for review by NMCMR under article 66, UCMJ, the most common problem is incomplete documentation. The most frequent omission is the SJA recommendation. When the SJA recommendation is included, often the proof of service on the defense counsel is missing, as is the appellate rights statement of the accused which includes the accused's election or waiver of appellate defense counsel. The latter document should be in the format set out in the appendix to the JAG Manual, not the one-page advisement of appellate rights the military judge uses. For cases reviewed under article 64, UCMJ, and submitted to OJAG for filing, the most frequently omitted documents in the ROT are the SJA advice and the action of the GCMA ordering the sentence executed. Often appellate rights statements are included in the record even though the appellant waived the right to appellate review before NMCMR.

C. Article 69(b). For cases submitted for review under article 69(b), UCMJ, the most frequent errors are that the petition by the accused is not submitted under oath and that the petition is not submitted through the chain of command, the CA and the GCMA. Complete instructions for submitting these petitions are set forth in Chapter I of the JAG Manual.

D. Copies. In addition to the errors noted above, records are frequently received missing the requisite number of copies. While only the original ROT is required for records submitted under articles 64 and 69, UCMJ, an original and two complete copies are required for records submitted for review under article 66, UCMJ. When used, post-trial forms need to be signed and dated with inapplicable portions lined out.

E. NAMARA ROT Contents Review Checklist

1. Original and 2 copies of ROT
2. Appellate rights statement--signed by accused indicating desire for counsel

3. Signed original and 3 certified copies of court-martial order
4. Signed recommendation of judge advocate/legal officer per R.C.M. 1106, Art. 60(d)
5. Signed receipt by DC of judge advocate/legal officer recommendation per R.C.M. 1106(f)(1), 1103(b)(3)(G)
6. DD Form 457 "Investigating Officer's Report" for Article 32 (GCM only)
7. Advice of staff judge advocate pursuant to Article 34 (R.C.M. 406)(GCM only)
8. Companion case
9. Records of former trials of the same case
10. Index sheet
11. Signed receipt of accused for copy of record of trial/"cert. in lieu of"
12. Court-martial convening order
13. Verbatim record of proceedings/page check
14. Charge sheet (DD Form 458), inserted in ROT after arraignment. (App 14-4, MCM, 1984)
15. Authentication of record by military judge
16. Signed original convening authority's action
17. Prosecution exhibits/defense exhibits
18. Appellate exhibits/pretrial agreement

5723 **QUARTERLY CRIMINAL ACTIVITY, DISCIPLINARY INFRACTIONS, AND COURT-MARTIAL REPORT (QCAR).** Per JAG Instruction 5800.9, forward QCAR's to: Navy-Marine Corps Appellate Review Activity, Building 111 (Code 40), Washington Navy Yard, Washington, D.C. 20374-1111
Message address: NAMARA JAG WASHINGTON DC; E-MAIL address: JAGO4

CHAPTER 61

ADMINISTRATIVE FACT FINDING BODIES

6101 REFERENCES

- A. JAG Manual, Chapter II
- B. JAGINST 5830.1

COURTS OF INQUIRY

6102 **COURT OF INQUIRY.** The Court of Inquiry (COI) is the most formal of the three administrative fact-finding bodies used in the Navy. Few active duty judge advocates have had occasion to become involved in these investigations. This may change, however, under the guidelines for fact-finding body selection in the 1990 revision of the JAG Manual. Two COIs have been conducted since the change took effect. Judge advocates can expect to see more and more of these investigations in the future.

6103 **PRELIMINARY CONSIDERATIONS.** The selection of the type of factfinding body is left to the judgment and discretion of the commander. Before convening an investigation, the convening authority must consider the powers the fact-finding body will require and the desirability of designating parties. If the subject of the inquiry involves disputed issues of fact and a risk of substantial injustice if an individual is not afforded the rights of a party, a COI or an investigation required to conduct a hearing should be ordered. If the ability to subpoena witnesses is necessary, a COI should be convened.

6104 **MAJOR INCIDENTS.** A COI should normally be convened if the subject of the investigation is a major incident. The character of the event as a major incident may be apparent when it is first reported or as additional facts are learned. For less serious cases, an investigation not requiring to conduct a hearing will normally be adequate.

A. **Definition.** JAGMAN, § 0202a(3) describes a major incident as an extraordinary incident occurring during the course of official duties where the circumstances suggest a significant departure from the expected level of professionalism, leadership, judgement, communication, state of material readiness, or other relevant standard resulting in;

1. Multiple deaths;
2. Substantial property loss, i.e., loss which greatly exceeds what is normally encountered in the course of day to day operations;
3. Substantial harm to the environment, i.e., harm that greatly exceeds what is normally encountered in the course of day to day operations; or
4. National public and press interest and significant congressional attention.

B. Death Cases. Regardless of the fact that a death case may not be a major incident as defined, the circumstances surrounding the death or resulting media attention may warrant convening a COI or investigation required to conduct a hearing as the appropriate means of investigating the incident. If at any time during the course of an investigation into a major incident it appears that the intentional acts of a deceased servicemember were a contributing cause to the incident, JAG will be notified and appropriate safeguards will be implemented to ensure a fair hearing regarding the deceased member's actions.

C. Cognizance over Major Incidents. The first flag or general officer exercising general court-martial convening authority over the incident or in the chain of command, or any superior flag or general officer will take immediate control over the case as the convening authority.

1. If the convening authority concludes at any time that an incident initially considered major isn't, or if he concludes that a COI is not warranted under the circumstances, he must report his conclusions to the next flag or general officer in his chain of command before convening any other type of investigation. This is a notification, not a request for approval, but the senior commander could properly assume cognizance over the incident as appropriate.

2. When a Marine training exercise or operation results in serious injury or death, the next senior commander above the organization involved shall consider convening the investigation. No member of any organization involved in the incident will be appointed as investigating officer unless that next senior commander concurs.

D. Preliminary Investigation of Major Incidents. Because the investigation of major incidents is sometimes complicated by the premature appointment of a Board of Inquiry or investigation required to conduct a hearing the convening authority may wish to initially convene a one-officer investigation not required to conduct a hearing to begin to immediately begin to collect evidence and preserve evidence and locate and interview witnesses. The convening authority set a specific

date for the Investigating officer to submit an interim oral report so that the convening authority may decide at that time which type of investigation to convene. Any summaries of testimony or evidence developed by the Investigating Officer may be used as an aid by any subsequent investigative body and the initial Investigating Officer may be detailed to assist the fact-finding body.

6105 CONVENING, COMPOSITION, AND PROCEDURES.

The COI can be convened by the written of any person authorized to convene a general court-martial (GCMA) or by any person designated by the Secretary of the Navy.

A. Composition. The COI consists of three or more commissioned officers. When practicable the senior member, who is the president of the court, should be at least an O-4. All members should also be senior to any person whose conduct is subject to inquiry. Legal counsel, certified and sworn under Articles 27(b) and 42(a) of the UCMJ, will be appointed to assist the court in matters of law, presentation of evidence, and in keeping and preparing the record; counsel will not assume an adversarial role.

B. Procedures. A formal hearing procedure is used. All testimony is taken under oath and a verbatim record is made. Though the proceeding is formal, the COI is administrative, not judicial. Therefore, as in any other administrative fact-finding body, the Military Rules of Evidence, except for Military Rules of Evidence: 301, self-incrimination; 302, mental examination; 303, degrading questions; 501-504, dealing with privileges; 505, classified information; 506, government information other than classified information; and 507, informants will not be followed. The court is held to the same burdens of proof, preponderance of evidence and clear and convincing, applicable to other administrative fact finding bodies. The COI has the power to subpoena civilian witnesses to the same extent as a court-martial.

INVESTIGATIONS REQUIRING A HEARING

6106 INVESTIGATIONS REQUIRED TO CONDUCT A HEARING. The investigation required to conduct a hearing is intended to be an intermediate option between an investigation not requiring a hearing and a Court of Inquiry (COI). Such investigations are used, for example, when a hearing with sworn testimony is desired or designation of parties may be required but only a single investigating officer is necessary to conduct the hearing.

A. Convening and Composition. The investigation required to conduct a hearing can be convened by the written appointing order of any officer authorized to convene a special court-martial. The investigation required to conduct a hearing

should normally be composed of a single officer. The investigating officer should be senior to any designated party and at least an O-4, or GS-13. The investigation may consist of more than one member but if multiple members are deemed appropriate, a COI should be considered. See JAGINST 5830.1, encl. (2) Para. 3b for additional rules when multiple members are appointed.

B. Procedures. The investigation is similar to the COI in several respects. Legal counsel should be appointed for the proceedings. The hearing is formal; testimony should be given under oath and the proceedings recorded verbatim. Unlike the COI, this investigation does not possess the power to subpoena civilian witnesses, unless convened to investigate a claim under Article 139, UCMJ.

6107 **PARTIES.** A "party" is a person who has properly been designated as such in connection with a COI or an investigation required to conduct a hearing because their conduct is "subject to inquiry" or they have a "direct interest" in the inquiry. The designation of an individual as a party affords that individual a hearing on possible adverse information concerning them.

A. Subject to Inquiry. A person's conduct or performance is "subject to inquiry" when the person is involved in the incident and it appears that disciplinary action may follow, their rights or privileges may be adversely affected, or their personal reputation or professional standing may be jeopardized. Designation of such personnel as parties is mandatory at a COI but optional at an investigation required to conduct a hearing.

B. Direct Interest. A person has a "direct interest" in the subject of inquiry when the findings, opinions, or recommendations may: reflect questionable or unsatisfactory conduct or performance of duty; or relate to a matter over which the person has a duty or a right to exercise control. Upon their request, servicemembers or DoD employees who have a direct interest in the subject of a COI must be designated as parties; designation is optional at an investigation required to conduct a hearing.

C. Designation. The convening authority of the COI or investigation required to conduct a hearing may designate parties. The convening authority may delegate this power to the fact-finding body.

D. Rights of a Party. A party has certain rights which are akin to those afforded to respondents at administrative discharge boards, including the right to counsel. The rights of parties are listed in detail in JAGMAN, § 0204d.

E. Other Uses of the Record Against Parties. If a servicemember has been designated a party to a COI or investigation required to conduct a hearing, the record may be used as the basis for nonjudicial punishment without further proceedings. Similarly, the record may theoretically be used in lieu of an Article 32 investigation

if a general court-martial is contemplated. Practically, however, this substitution is difficult; convening of a separate Article 32 investigation will likely be more efficient. If the accused was designated as a party, sworn testimony given to the fact-finding body is admissible and may be useful.

The Investigation Report: See Encl (7), JAGINST 5830.1 for sample report of a court of inquiry and investigation requiring a hearing.

INVESTIGATIONS NOT REQUIRING A HEARING

6108 INVESTIGATIONS NOT REQUIRING A HEARING.

The JAG Manual investigation is the most common administrative factfinding body convened to search out, develop, assemble, analyze, and record all available information relative to an incident. The report is advisory in nature, intended primarily to provide convening and reviewing authorities with adequate information on which to base decisions. JAG Manual investigations also serve as a repository of lessons learned which may be disseminated to other naval units.

A. Convening. Any officer with article 15 power may convene an investigation not requiring a hearing. The commander of the unit concerned is responsible for convening the investigation. If, however, an incident far from the command (e.g., member dies on leave) or when the command has a practical difficulty in conducting the investigation (e.g., ship due to deploy), the commander can ask the Navy area coordinator (or a subordinate GCMA designated by the area coordinator for this purpose) or the Marine GCMA in whose geographic area of responsibility the incident occurred. JAGMAN, § 0206.

B. Required Investigations. The JAG Manual requires investigation of numerous events including: fires, possible claims, accidental discharges, aircraft and vehicle accidents, collisions, grounding, and other significant events. A JAG Manual investigation must also be conducted in all servicemember death cases that are not a result of a "previously known medical condition" or combatant activities and when civilians are found dead on naval bases. (MILPERSMAN 4210100 details PERS-CASREP reporting requirements and follow-on status investigation reports every 14 days).

C. Appointing Order. The commander initiates the investigation with the appointing order. Samples appear in the JAG Manual at appendices A-2-c and A-2-d and the appendix to this chapter. Appoint one or more commissioned officers (usually one) or, if appropriate, a warrant officer, senior enlisted, or DON civilian employee. The Investigating Officer (IO) should be mature, experienced, and senior

to any person whose conduct may be in question. Prepare the appointing order on command letterhead for the commander's signature. The appointing order should specify the deadline for the IO's report. The JAG Manual authorizes 30 days; the command may specify a shorter time, i.e., 15 days, in straightforward incidents to allow time for any corrective action by the IO which the commander deems necessary.

D. The Investigation Report. Samples appear in the JAG Manual at appendix A-2-e(1) and the appendix to this chapter. The report is: "From" the IO by name "To" the CO; prepared on plain paper, not letterhead; and signed by the IO. Use the same subject line as the appointing order. Any additional references would follow sequentially. The sample in the appendix to this chapter provides additional information on requirements for the preliminary statement, findings of fact, opinions, and recommendations.

E. Combining with Other Investigations. If different aspects of a single incident may require investigation, generally only one investigation need be done. For example, if a sailor drives a command vehicle into the NLSO, seriously injuring himself and killing a typist inside, a single investigation will be adequate to address the claims, death, and line of duty/misconduct issues involved. The exceptions to the general rule include prohibitions against using the following material in JAG Manual investigations:

1. NIS investigation narratives [exhibits MAY be used with prior NIS permission];
2. statements made in Aircraft Mishap Investigation Reports (AMIR);
3. polygraph examinations;
4. statements made in Medical Quality Assurance Investigations; and
5. Inspector General Reports.

F. CO's Endorsement. The first endorsement is "From" the CO "To" the Judge Advocate General, via the GCMA, and via the chain of command as may be required by local directives. The CO has 20 days to prepare the endorsement in death investigations; 30 days in all other cases. A sample endorsement is provided in the appendix to this chapter. Use the same subject line as the appointing order. The endorsement will approve, modify, or disapprove the FOF, opinions, and recommendations and indicate any action that has been taken on the IO's recommendations. If additional FOFs, opinions, etc. are made on the existing record, they will follow sequentially from the last FOF, opinion, etc. in the IO's report. The CO must specifically comment on any LOD/misconduct determinations. The

endorsement must end with "subject to the foregoing, the findings of fact, opinions, and recommendations of the basic investigation [as modified] are hereby approved."

G. Making Copies. In cases involving a death or serious injury send JAG the original and three copies; if not, send JAG the original and one. Provide one copy for each via addressee. If a potential claim exists, send a copy to the NLSO or Law Center. Advance copies with the first endorsement should be sent to: OJAG Code 33, in death and medical malpractice; to OJAG Code 31, in admiralty investigations; to CNO/CMC in postal investigations; and to COMNAVSAFECEN in material property damage investigations. Advance copies of Marine investigations must be sent via CMC (JA)

H. FOIA. The only release authority for JAG Manual investigations requested under the Freedom of Information Act is OJAG, NOT the local command.

"COURT OF INQUIRY LESSONS LEARNED"

I. Personnel.

A. Counsel. Detail Counsel/Assistant Counsel for the Court as early as possible and get them on scene.

B. Court Reporters. At least four court reporters will be needed to maintain near-simultaneous transcription. A senior LN with excellent leadership ability should be clearly identified as the boss.

C. Admin Officer/Evidence Custodian/Computer Expert

1. LDO or Khaki LN
2. Key attribute is flexibility
3. Is not the Head Court-Reporter

D. Court Members

1. Convening Authority should select based on particular expertise needed
2. Delay arrival until Counsel have had sufficient time to prepare the case; minimum of 1 week
3. Passive role
 - a. Counsel should prepare and present the case
 - b. Members should use their expertise to point counsel in relevant directions but should not become active investigators; Avoids potentially contentious voire dire and challenges

E. Defense Counsel

1. Need to identify potential parties ASAP so that number of defense counsel is known
2. Need to identify person with authority to detail defense counsel

F. Technical experts for unfamiliar areas; Nonadversarial experts available to all

- G. Law enforcement personnel. Although law enforcement investigations are separate entities, there is no reason not to cooperate
- H. PAO Support. Need to have it established. You don't know you actually need it until it is too late
- I. Miscellaneous
 - 1. Bailiff
 - 2. Security personnel
 - 3. Gofers
 - 4. Aides, if Court membership includes Flag Officers
- II. Equipment and Material
 - A. Court Reporting Gear
 - 1. Enough mikes to cover all the players
 - 2. At least 3 court reporting stations
 - 3. At least 2 recording systems (1 as backup which can also be used as transcriber)
 - 4. Carry a minimum of 100 blank tapes and a box of mini computer discs
 - 5. Hand held recording device for use during "views"
 - B. Laptop computers -a minimum of 4
 - C. Laser printer. Must locate a high quality, high volume printer. Portable laser printers just can't stand up to the volume of work generated
 - D. Dedicated, high volume, rapid reproduction copy machine
 - E. Office Supplies
 - 1. Paper, pens, pencils etc.; Can usually rely on local sources, but bring a skeleton set

2. Make local arrangements for coffee/soda mess
3. Tables, chairs, flag, miscellaneous furnishings for hearing room.
(Must use local sources)

F. Electrical Power

1. Be aware of available voltage (110 or 220). If electrical gear is not switchable, bring or locally obtain transformers.
2. Bring sufficient surge suppressors
3. If operating aboard ship, comply with rules regarding electrical safety checks. (They protect you and your equipment.)
4. Be prepared for power fluctuations. (Use surge suppressors and hit the "save" key frequently)

III. Communications

- A. Phones with commercial and autovon access
- B. Separate message address for Court

IV. Logistics

A. Transportation to site

1. Government air is unreliable
2. Counsel for Court and admin support should arrive at least 1 week in advance to prepare, investigate, and take care of logistics
3. Defense Counsel should travel as soon as number of potential parties is known
4. Court members should be the last to arrive

B. Hearing site

1. No problem if at a NLSO where you can take over a courtroom.
(Many NLSO courtrooms, however, are too small for a multi-party Court of Inquiry)
2. Need large room with available facilities:

- a. Deliberation room
 - b. Witness room
 - c. Admin/Evidence room
 - d. Coffee Mess
 - e. Head facilities
 - f. Telephones
- 3. Must provide security for evidence and expensive court reporting equipment
- C. Local transportation
 - 1. Sedans for:
 - a. Court members
 - b. Counsel
 - c. Errands
 - 2. Ban for court-reporters
 - 3. Bus or other means of commuter transportation for parties, counsel, and witnesses
- D. Housing
 - 1. If at TAD sight, house everyone in one place. If ship can handle size of group, great. If not, get together in a BOQ, hotel, etc.
 - 2. Court members should be reasonably segregated from defense counsel and parties
- E. Messing. Have an available option, particularly for noon meal
- V. Conducting the Hearing
 - A. Every player must, at the outset, be thoroughly familiar with:
 - 1. Convening order

2. JAGMAN, Chapter II

3. JAGINST 5830.1

- B. Court and its counsel must constantly be attuned aid the fact that the proceedings are nonadversarial, and must do everything possible to avoid even the appearance of advocacy; Difficult to maintain since defense counsel will, and properly so, act in an adversarial capacity. Don't let your competitive instincts get you in the middle of the fight.
- C. Be attuned to potential 5th Amendment/Article 31 and Privacy Act issues
- D. If civilian employees are potential parties:
 - 1. They cannot be designated as parties unless they so request. JAGMAN 0204 b(6)
 - 2. They cannot be provided military counsel unless the Convening Authority determines that the interests of the Government will be best served. JAGINST 5830.1, encl (1), Section 3.d.(2) (c)
- E. Know the relative seniority of parties, including civilians. Important because:
 - 1. Members should be senior to all parties, unless exception granted by Convening Authority
 - 2. Order of witness examination, defense case presentation and argument are all based on seniority
- F. Provide COI Guide to President. Include:
 - 1. Calling Court to order, recessing, closing etc.
 - 2. Rulings on challenges
 - 3. Rulings on objections; With a few exceptions, e.g., relevance, proper ruling is, "Objection is (are) noted"
 - 4. Warnings to witnesses at end of their testimony
- G. Don't get rushed; If necessary to stay organized and orderly, recess for reasonable time

VI. Who's the boss?

- A. The President and Court Members
- B. The Convening Authority
- C. Not NLSO CO, JAG, Member of Congress, etc.

CHECKLIST FOR INVESTIGATING OFFICERS

A. INITIAL ACTION

1. Begin work on the investigation immediately upon hearing that you are to be appointed investigating officer; don't wait until you have received a formal appointing order.
2. Carefully examine the appointing order to determine the scope of your investigation.
3. Review all relevant instructions on your investigation, including the appointing order and Chapters II and VIII of the JAGMAN.
4. When must your investigation be completed and turned into the convening authority?
5. Decide on the methodology of your investigation.

B. INTERVIEWING WITNESSES

1. Draw up a list, to be supplemented as the investigation proceeds, of all possible witnesses.
2. Determine if witnesses are transferring, going on leave, hospitalized, or the like, which might take them out of the area before review of the investigation is completed.
3. Inform the convening authority, orally, with confirmation in writing, immediately upon learning that a material witness might leave the area before review of the investigation is completed. The convening authority may wish to take appropriate action to prevent the witness from leaving pending review of the investigation.
4. Determine which witnesses may be suspected of an offense under the UCMJ and advise each of his rights against self-incrimination and to counsel using the form found in Appendix A-1-m of the JAGMAN.
5. Advise each witness who may have been injured as a result of the incident being investigated of his right not to make a statement with regard to the injury in accordance with Section 0215b of the JAGMAN.
6. Conduct an intensive interview of each witness on the incident being investigated, covering his full knowledge of:

- a. Names, places, dates and events relevant to the incident investigated
- b. other sources of information on the incident investigated

7. Obtain an appropriate, signed Privacy Act statement from the individuals named in the subject line of the appointing order. (Note: Do not ask witnesses for their Social Security number. The SSN should be obtained from official records if needed and the source of the SSN should be stated in the preliminary statement.)

8. Record the interview of each witness in detailed notes or by mechanical means.

9. Reduce each witness' statement to a complete and accurate narrative statement.

10. Obtain the signature of each witness, unde oath and witnessed, on the narrative statement of his interview.

11. Review carefully your list of possible witnesses, as supplemented, to ensure that you have interviewed all such witnesses who are personally available to you.

12. Attempt to obtain statements from possible witnesses who are not personally available, in other ways, e.g., by requesting that they be supplied to you be message, mail or conducting a telephone interview.

C. COLLECTION OF DOCUMENTS

1. Draw up a list, to be supplemented as the investigation proceeds, of all possible documents using the checklists in this Deskbook.

2. Carefully examine your list of possible documents, as supplemented, to ensure that you have obtained all such documents personally available to you.

3. With regard to possible documents that are not personally available to you, attempt to obtain them in other ways, e.g. by requesting that they be supplied to you by message, telephone, fax, or mail.

4. To the extent possible, obtain originals or certified true copies of all documents available to you.

D. COLLECTION OF OTHER INFORMATION

1. Draw up a list, to be supplemented as the investigation proceeds, of any other information which may be of assistance to reviewing authorities in understanding the incident investigated, e.g., objects (firearms, bullets, etc.) and physical locations (accident sites, etc.).

2. Examine your list of such information, as supplemented, to assure that you have obtained all such information, personally available to you.

3. With regard to such information not personally available to you, attempt to obtain them in other ways, e.g. by requesting that they be supplied to you by message, phone or mail.

4. To the extent possible, reduce such information to a form, such as photographs or sketches, which can be conveniently included in your investigative report.

5. With regard to other evidence gathered, take all steps possible to insure that any such evidence not an enclosure to the investigative report will be kept in an identified place, safe from tampering, loss, theft, and damage pending review of the investigation.

E. PREPARATION OF THE PRELIMINARY STATEMENT

1. What you understand to be the purpose of your investigation.

2. Difficulties encountered in the investigation.

3. Conflicts in the evidence and reasons for reliance on particular information, if any.

4. Reasons for any delays.

5. Failure to advise persons of article 31, Privacy Act, injury/disease rights.

6. Any assistance received in conducting the investigation.

7. Your efforts to obtain possible statements of witnesses, documents, and other evidence which you were unable to obtain.

8. What your efforts have been to preserve evidence pending review of the investigation.

9. How you obtained social security numbers.

10. If a possible claim is involved include the appropriate "attorney work product" language required by sections 0211c & 0214c of the JAGMAN.

F. PREPARING THE FINDINGS OF FACT

1. Conduct an evaluation of evidence or lack of evidence (negative finding of fact).

2. Avoid unsubstantiated speculation.

3. Compare with the special factfinding requirements pertaining to specific incidents in the JAGMAN addressed.

4. Be specific as to times, places, and events.

5. Refer to supporting enclosure(s) after each finding of fact.

6. Identify by grade or rate, service number, organization, occupation or business, and residence person(s) connected with the incident.

Note: Your personal observations are not, in and of themselves, sufficient to support a finding of fact. If you have made relevant "personal observations," reduce them to statement signed and sworn to by yourself and include the statement as an enclosure.

7. All enclosures used? (If not used, delete it).

8. Ensure that, when read together, the finding of fact tell the whole story of the incident investigated without reference back to the enclosures.

G. PREPARING THE OPINIONS

1. Ensure that each of your opinions is an opinion and not a finding of fact or recommendation.

2. Ensure that each opinion references the findings of fact that support it.

3. Ensure that you have rendered those opinions required by the appointing order or JAGMAN as well as any others you might feel are appropriate?

4. Ensure scope of employment opinions are rendered, if required.

Note: In cases involving the death of a servicemember it is forbidden to render any opinion concerning line of duty. Also misconduct as defined in the JAGMAN shall not be attributed to the deceased servicemember.

H. PREPARING THE RECOMMENDATIONS

1. Ensure that each of your recommendations is a recommendation and not a finding of fact or opinion.
2. Ensure that each recommendation is logical and consistent with the findings of fact and opinions.
3. Address those recommendations specifically required by the appointing order or the JAGMAN and any others considered appropriate are addressed.
4. Recommend any appropriate corrective, disciplinary or administrative action.
 - a. Enclose a signed, sworn charge sheet if you recommend a servicemember be charged with any offense. **DO NOT INFORM AN ACCUSED OF RECOMMENDED CHARGES UNLESS YOUR ARE DIRECTED TO DO SO BY THE PROPER AUTHORITY.**
 - b. Draft a punitive letter of reprimand if recommended, and attach it as an enclosure.
 - c. Non-punitive letters are not attached as enclosures; rather, they are forwarded under separate cover.

I. PREPARING THE ENCLOSURES

1. Appointing order.
2. Statement of doctor and/or copies of medical records as to the extent of the injuries (copies of private medical bills if reimbursement may be claimed).
3. Report of autopsy and, where available, autopsy protocol in death cases.
4. Report of coroner's inquest or medical examiner's report in death cases.
5. Laboratory reports, if any.
6. Copy of reservists' orders, if applicable.
7. Statements or affidavits or witnesses or others.

8. Statement of Investigating Officer, if applicable.
9. Necessary photographs and/or diagrams, properly identified and labeled.
10. Copy of local regulations, if applicable.
11. Exhibit material to support investigating officer's findings and opinions.
12. Signed original Privacy Act statements.

J. CONCLUDING ACTION

1. Have you stretched your imagination to the utmost in gathering and recording all possible information on the incident investigated?
2. Have you checked and double-checked to ensure that your findings of fact, opinions, recommendations, and enclosures are in proper order?
3. Have you carefully proofread your Investigative Report to guard against embarrassing clerical errors?

GENERAL CHECKLIST FOR JAG MANUAL INVESTIGATIONS
NOT REQUIRING A HEARING

In reviewing a JAG Manual investigation, the following should be checked:

1. Appointing order (if written)
 - a. Convened by commanding officer, or officer in charge, or delegate
 - b. Name(s) of member(s)
 - c. Seniority rule for member(s)
 - d. Scope of inquiry defined, including sections in JAG Manual outlining special investigative requirements
 - e. Whether opinions/recommendations required
 - f. Deadlines addressed
 - g. Warnings under Article 31, UCMJ § 0215b, injury/disease; § 0202, Privacy Act
 - h. Attorney Work Product Statement, § 0211(c)
 - i. Assistance available
2. Investigative report
 - a. Heading and copies
 - (1) "From" command
 - (2) "To" JAG
 - (3) "Via" and "Copy to" addressees identified (JAGMAN, §§ 0209-0210)
 - (4) Advance copies (JAGMAN, § 0209c)
 - (5) Sufficient copies, complete with enclosures, for convening and reviewing authorities and JAG (JAGMAN, §§ 0209-0210)
 - (6) Ensure all copies are legible

- (7) All necessary documents/exhibits/enclosures are attached
- (8) Investigation properly classified or unclassified (JAGMAN, § 0209d)

b. Preliminary statement

- (1) Identify nature of investigation and reference appointing order
- (2) Limited participation of any member(s)
- (3) Difficulties encountered in the investigation
- (4) Conflicts in evidence and reasons for reliance on particular information, if any
- (5) Reasons for any delays
- (6) Failure to advise persons of Article 31, UCMJ; Privacy Act; injury/ disease, or, "party" rights
- (7) Attorney Work Product Statement

c. Findings of fact

- (1) Narrative or separate facts
- (2) Evaluation of evidence or lack of evidence (negative finding of fact)
- (3) No speculation as to cause of the incident. Inferences drawn from evidentiary enclosures or personal observations, however, are permissible.
- (4) Special factfinding requirements of Part B, Chapter II of the JAG Manual addressed
- (5) Specific as to times, places, and events
- (6) Reference enclosure(s)
- (7) Person(s) connected with the incident identified by grade or rate, service number, organization, occupation or business, and residence

- (8) All factual evidence, including investigating officer's personal observations, considered and included in the report as enclosure(s) and finding(s) of fact

d. Opinions

- (1) Logical inferences or conclusions from facts
- (2) Reference findings of fact
- (3) Properly labeled
- (4) Those required by appointing order or JAG Manual addressed and any others considered appropriate

e. Recommendations

- (1) Logical and consistent with opinions and findings of fact
- (2) Those required by appointing order or the JAG Manual addressed and any others considered appropriate
- (3) Corrective, disciplinary or administrative action
- (4) Signed, sworn change sheet enclosed if court-martial recommended
- (5) Draft of punitive letter of reprimand if recommended
- (6) If recommended, nonpunitive letters are forwarded under separate cover

f. Enclosures

- (1) Separately numbered
- (2) All evidence
- (3) Signed, sworn witness statement or summary of witness' oral statement
- (4) Authenticated copies of documents
- (5) Each statement, document or exhibit a separate enclosure

g. Endorsements

- (1) Convening authority and subsequent addressees set forth action taken
- (2) State relevant disciplinary, administrative or operational information known at time investigation reviewed that is not contained in record or prior endorsements
- (3) Approve/disapprove/modify proceedings, facts, opinions, and recommendations in record and prior endorsements
- (4) Any action taken

DOCUMENTS CHECKLIST FOR JAG MANUAL INVESTIGATIONS
NOT REQUIRING A HEARING

1. Appointing order
2. Extension request, if necessary
3. Police of Incident Complaint report, if necessary
4. Statement of doctor and/or copies of medical records as to extent of injuries (copies of private medical bills if reimbursement may be claimed)
5. Report of autopsy and, where available, autopsy protocol in death cases
6. Report of coroner's inquest or medical examiner's report in death cases
7. Laboratory reports, if any
8. Copy of reservist's orders, if applicable
9. Statements or affidavits of witnesses or others
10. Statement of investigating officer, if applicable
11. Photographs and/or diagrams properly labeled
12. Copy of local regulations, if applicable
13. Exhibit material to support IO's findings and opinions
14. Signed original Privacy Act statement for each witness if personal information has been solicited
15. Message traffic surrounding the incident

**POSSIBLE SOURCES OF INFORMATION
FOR SHIPBOARD INVESTIGATIONS**

1. Personnel
 - a. Allowance
 - b. Manning level
 - c. Stability
 - d. General personnel appearance
 - e. Safety hazards
 - f. Any history of accidents for person(s) involved
2. Equipment
 - a. History of failures
 - b. Proper design or jury rigged
 - c. COSAL, open purchase, substitute
 - d. Complete operating instructions
 - e. Safety precautions
 - f. Properly labeled: Compartments, piping, ducts
 - g. Piping systems
 - h. PMS/MDCS coverage, documentation
 - i. Clocks synchronized, time-check log maintained and, if appropriate, any time check in affected spaces
 - j. Communication circuits adequate: IMC and other intercom systems, sound-powered phones
 - k. Age of ship in years

1. Firefighting and damage control equipment and techniques used to control or reduce damage, operative or inoperative, effective or ineffective
3. Location of accident (where most damage occurred)
 - a. Compartment number
 - b. Compartment noun name
 - c. In what compartment did primary accident cause occur?
4. Logs, records and reports - Review and check for corrective action taken/contemplated
 - a. Deck log
 - b. Sonar logs
 - c. Watch, quarter and station bill
 - d. Navigation center log
 - e. Engineering smooth log
 - f. Engine bell book
 - g. Engineering operating logs
 - h. Damage control closure log
 - i. Tag-out log
 - j. Standing orders: Unit commander, commanding officer, engineering officer, navigator
 - k. Night orders: Unit commander, commanding officer, engineering officer, navigator
 - l. Training records: Shipboard, plan of the day, team, watch qualification, equipment qualification, ship qualification, individual personnel
 - m. Quartermaster's notebook
 - n. Radio log

- o. Personnel records
 - p. Ship's operating schedule
 - q. INSURV, command inspections, combined trials
 - r. Monthly hull reports, 2000 reports, zone inspections
 - s. Significant outstanding CASREPTS
 - t. Machinery out-of-commission logs
 - u. Ships procedures adequate, followed
5. Morale
- a. Liberty/leave
 - b. Number of duty sections/watch sections
 - c. Working hours, as indicated in plan of the day and deck logs
 - d. Habitability (air conditioning, ventilation, laundry facilities, lighting system, general housekeeping, heads, living quarters, working spaces, recreational spaces)
6. Condition of ship's boats
7. Availability of shore services
- a. Electricity
 - b. Shore steam
 - c. Potable and firefighting water
 - d. High pressure air
8. Illumination
- a. Exterior
 - b. Interior
 - c. At scene

9. Full description of damage sustained to ship and equipment, including:
 - a. Material costs to Navy
 - b. Navy manhours required to repair damage
 - c. Off-ship labor costs
 - d. Outside assistance costs (drydock, etc.)
10. Primary and contributing causes

CLAIMS FOR/AGAINST GOVERNMENT-SPECIAL CHECKLIST

1. Names/addresses of witnesses/passengers, if any
2. Names, grades, organizations, addresses and ages of all civilian/military personnel injured or killed
3. Claim prospects and name and address of claimant or potential claimant
4. Owner of damaged property, if any
5. Basis of claimant's alleged right to file a claim, e.g., owner, renter, etc.
6. Scope-of-employment status of Government employee(s)
7. Description of government property involved and nature and amount of damage, if any
8. Nature and extent of injuries, degree of permanent disability, prognosis, period of hospitalization, quality of medical care provided
9. Name and address of attending physician and hospital
10. Amount of medical, hospital and burial expenses actually incurred
11. Occupation and wage or salary of civilians injured or killed
12. Names, addresses, ages, relationships and extent of dependency of survivors of any person fatally injured
13. Violation of state or Federal statutes, local ordinances or installation regulations by a party
14. Police investigation results; Arrests made, or charges preferred, and result of any trial or hearing in civil or military courts
15. Comments and recommendations of investigating officer as to the amount of damages, loss, or destruction and the extent of liability
16. Statements in convening order and investigative report that the investigation has been prepared for the purpose of assisting attorneys representing the interests of the United States in this matter

FIRE-SPECIAL CHECKLIST

1. Items in addition to the Forces Afloat Accident/Near Accident Report (OPNAV Form 3040/1) and general checklist
 - a. Location of fire
 - (1) Compartment noun name
 - (2) Compartment number
 - b. Class of fire (A-B-C-D)
 - c. Time fire detected
 - d. Means of detection
 - e. Time fire started (estimated)
 - f. Time fire alarm sounded
 - g. Time fire located
 - h. Time started fighting fire
 - i. Time general quarters sounded
 - j. Time assistance was requested
 - k. Time assistance arrived
 - l. Time boundaries set
 - m. Time fire extinguished
 - n. Fire did/did not reflash
 - o. Extinguishing agents used (indicate effectiveness)
 - (1) Fire main water (submarines: trim/drain system water)
 - (2) Light water

- (3) Foam (portable/installed)
 - (4) CO2 (portable/installed)
 - (5) PKP
 - (6) Steam smothering
 - (7) Flooding
 - (8) Other
- p. Extinguishing equipment (indicate availability and operability)
- (1) Pumps (portable/installed) size and quantity
 - (2) Nozzles/applicators (LC and HC)
 - (3) Foam maker
 - (4) Vehicles
 - (5) Eductors
 - (6) Type and size of hoses
 - (7) Other
- q. Firefighting organization used
- (1) Nucleus fire party
 - (2) Repair party (condition I or II watches)
 - (3) Inport fire party
 - (4) Outside assistance (explain)
 - (5) Fire party/repair locker personnel assigned per appropriate publications, ships organization and regulations manual, battle bill, etc.
 - (6) Personnel duties and responsibilities assigned in writing
 - (7) Fire/repair locker organization charts properly maintained

- (8) Damage control system diagrams up to date and available for use
- (9) Communications effectively established between control stations
- r. Protective equipment used (Indicate availability, operability, and effectiveness)
 - (1) OBAs
 - (2) EAB masks
 - (3) Fire suits
 - (4) Boots
 - (5) Gloves
 - (6) Helmets
 - (7) Other
- s. Alarm system
 - (1) CO2 flooding
 - (2) High temperature
 - (3) Other
- t. Fire contained/spread
- u. How it spread
 - (1) Through hot deck/bulkhead
 - (2) Through hole in deck/bulkhead
 - (3) By explosion (type)
 - (4) Through vent ducts
 - (5) By liquid flow
 - (6) By wind

- (7) Other (explain)
- v. Electric power in area
- w. Jettison bill
 - (1) Current
 - (2) Used
- x. If ship underway, course changes (snorkeling, surfaced)
- y. Automatic vent closures
- z. Magazines flooded
- aa. Operational problems
 - (1) OBAs/canisters effective, sufficient number
 - (2) EABs effective
 - (3) Sufficient water and pressure
 - (4) Flooding problems
 - (5) Drainage problems (installed/portable)
 - (6) Desmoking problems (installed/portable)
 - (7) Lighting (explain)
 - (8) Adequate equipment readily available
 - (9) Adequate intra-ship communications
 - (10) Other (explain)
- bb. Material discrepancies of any equipment used (list and explain)
- cc. Determine all heat/ignition sources possible then eliminate those that are improbable

- dd. Operating personnel qualified in accordance with PQS requirements for the systems operation and maintenance
- ee. Extent of damage/cost to repair, casualties
- ff. Impact on mission readiness
- gg. Possibility of occurrence on similar ship

FLOODING-SPECIAL CHECKLIST

Items in addition to the Forces Afloat Accident/Near Accident Report (OPNAV Form 3040/1) and the general checklist

1. Location of flooding
 - a. Compartment noun name
 - b. Compartment number
2. Type of flooding (fresh or salt water, oil, JP-5, etc.)
3. Source of flooding (internal or external)
 - a. Pipe rupture or valve failure
 - b. Tank rupture/hull rupture/shaft seal failure
 - c. Open to sea through designed hull penetration
 - d. Other
4. Time flooding was detected
5. Flooding detection method
6. Time duty emergency party called away/general quarters sounded
7. Response time
8. Dewatering equipment used (effective, available, operative)
9. Time flooding was stopped or under control
10. Time required to dewater
11. Time space was last inspected prior to flooding
12. Flooding contained within set boundaries
13. Amount of flooding (effect on list, trim or depth control)
14. Extent of Damage (list all items)

- a. Material costs
 - b. Labor costs
 - c. Outside assistance costs
15. Injuries (list and submit NAVJAG Form 5800/15)
16. Ship's procedures and safety precautions

COLLISION-SPECIAL CHECKLIST

1. Items in addition to the Forces Afloat Accident/Near Accident Report (OPNAV Form 3040/1) and the general checklist
 - a. Tactical situation existing at time of collision
 - b. Personnel manning and qualification
 - (1) CDO
 - (2) OOD/diving officer
 - (3) Helmsman, planesman
 - (4) Lookouts
 - (5) CIC team (including sonar team, fire control tracking party and navigation team)
 - (6) Phone talkers
 - (7) Location of conning officer
 - (8) Line handlers
 - (9) Personnel qualifications
 - c. Material factors
 - (1) Radar
 - (2) Sonar
 - (3) Navigational lights
 - (4) Periscopes
 - (5) Compasses
 - (6) Ship control systems
 - (7) Ballast, blow and vent systems
 - (8) UNREP special equipment

- d. Communication factors
 - (1) Radio
 - (2) Telephone
 - (3) Oral (audibility/understanding)
 - (4) Signal systems
 - (5) Interferences (e.g., background noise level)
- e. Rules-of-the-road factors
- f. Operating area factors
 - (1) Adherence to op area boundaries
 - (2) Existence of safety lanes
 - (3) Depth constraints
 - (a) Depth separation
 - (b) Depth changes
 - (c) Out-of-layer operations
- g. Environment and visibility
- h. Unique local practices
- i. Assistance factors
 - (1) Pilot - experience/language barrier
 - (2) Tugs
 - (3) Line handlers
- j. For collisions in restricted waters or with fixed geographic features (including buoys) refer also to the checklist for groundings

GROUNDING

1. Items in addition to the Forces Afloat Accident/Near Accident Report (OPNAV Form 3040/1) and the general checklist
 - a. Tactical situation
 - b. Navigational factors
 - (1) Charts (available/correct/in use)
 - (2) Sailing directions/coast pilot
 - (3) Fleet guide
 - (4) T i d e / c u r r e n t c o n d i t i o n
(computed/displayed/recorded)
 - (5) Track laid out/DR plot indicated/fixes plotted/track projected
 - (6) Notices to mariners
 - (7) Compass errors/application
 - (8) Navigation fix errors
 - (9) Navigation reset errors
 - (10) Depth of water
 - (11) Type of bottom
 - (12) Navigation reference points coordinated (radar/visual, points logged/plotting teams coordinated)
 - c. Material factors
 - (1) Radar
 - (2) Fathometer
 - (3) Compasses
 - (4) Ship's depth indicators

- (5) Ship's speed log
- (6) Alidades, bearing circles, peroruses, periscopes, bearing repeaters
- (7) Sounding lead
- (8) Ship's draft/submerged keel depth
- (9) Ship's anchor
- (10) Ship's control system
- d. Personnel factors (posted/qualified)
 - (1) CDO
 - (2) OOD
 - (3) Diving officer
 - (4) Navigator
 - (5) Piloting officer
 - (6) Fathometer operator
 - (7) Lookouts
 - (8) Helmsman
 - (9) Planesman
 - (10) Bearing takers
 - (11) CIC team
 - (12) Leadsman
 - (13) Line handlers
 - (14) Local pilot
 - (15) Location of conning officer

- (16) Personnel qualified in accordance with PQS requirements for the systems operation and maintenance
- e. Communications factors
 - (1) Radio
 - (2) Telephone
 - (3) IC systems
 - (4) Oral (audibility/understanding)
- f. Environment
 - (1) Light conditions
 - (2) Visibility
 - (3) Wind, current, tide condition (actual vs. predicted)
- g. Assistance factors (tugs)
- h. Organizational factors
 - (1) Ship organization directives
 - (2) Watch organization directives
- i. Action taken after grounding
 - (1) Ship secured to prevent further damage
 - (a) Anchors kedged out
 - (b) Ballast shifted
 - (c) Cargo shifted
 - (2) Draft readings/soundings taken
 - (3) Damage surveyed
 - (4) Excess machinery secured

APPOINTING ORDER FOR A ONE-OFFICER INVESTIGATION
WHEN A HEARING IS NOT REQUIRED (See section 0211)

(LETTERHEAD)

(File Info)
(Date)

From: Commanding Officer, _____
To: Lieutenant _____, U.S. Navy, 000-00-0000/1100

Subj: INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES CONNECTED WITH _____, WHICH OCCURRED AT (LOCATION) ON (TIME AND DATE), RESULTING IN INJURIES TO (RATE, NAME, BRANCH OF SERVICE, SERVICE NUMBER), AND DAMAGE TO GOVERNMENT VEHICLE (I.D. NUMBER)

Ref: (a) JAG Manual

1. Under chapter II, part B of reference (a), you are appointed to inquire, as soon as practical into circumstances surrounding the _____ that occurred on _____ August 19____.

2. You are to investigate all facts and circumstances surrounding the _____ that occurred at _____ on _____ August 19____. You must investigate the cause of the fire, resulting injuries and damages, and any fault, neglect, or responsibility therefor. You must express your opinion of the line of duty and misconduct status of any injured naval member. You should recommend appropriate administrative or disciplinary action. Report your findings of fact, opinions, and recommendations by _____ September 19____, unless an extension of time is granted. In particular, your attention is directed to sections 0202e, 0213, 0215b, and appendix A-2-e of reference (a).

[When there is a potential claim against the United States either in admiralty or under the Federal Tort Claims Act, or if there is potential litigation against the United States, add the following language:]

3. This investigation is appointed in contemplation of litigation and for the express purpose of assisting attorneys representing interests of the United States in this matter. You will contact (the judge advocate providing legal support) for direction and guidance as to those matters pertinent to the anticipated litigation.

4. Ordinarily counsel for the proceedings will not be appointed. If appointment is desired, do so here.

5. By copy of this appointing order, LT Smith, Administrative Officer, is directed to furnish necessary administrative and clerical assistance for recording the proceedings and preparing the record.

/s/
A. B. SEA

Copy to:
AdminO

To focus the IO's efforts and ensure all relevant findings of fact are made, list all sections of the JAG Manual which may apply to the particular incident. The following list is provided for quick reference.

JAG Manual

Sections

Warnings

0215b	Warning required before requesting statements regarding disease or injury
0202	Advice required by the Privacy Act
Art. 31	Persons suspected of violations of UCMJ
UCMJ	

Line of duty/misconduct determinations

0220	Mental responsibility and suicide attempts/gestures
0221	Intoxication and drug abuse
0226	Deaths
0227	LOD/Misconduct investigations which involve claims
0229	Checklists for factfinding bodies
0230	Aircraft accidents
0231	Vehicle accidents
0232	Explosions
0233	Loss or stranding of a ship
0234	Collisions
0235	Flooding of a ship
0236	Fires
0237	Loss of government funds or property
0238	Claims for or against the government
0239	Reservist
0240	Firearm accidents
0241c	Security violations
0241d	Postal violations

APPOINTING ORDER FOR A BOARD OF INVESTIGATION
WHEN A HEARING IS NOT REQUIRED (See section 0211)

From: Commander Carrier Group ONE, U.S. Pacific Fleet

To: Captain _____, USN

Subj: INVESTIGATION OF THE FIRE THAT OCCURRED ON BOARD USS
_____, ON ____ AUGUST 19____

Ref: (a) JAG Manual

1. Under chapter II, part B, of reference (a), a Board of Investigation is hereby appointed to inquire into circumstances surrounding the fire that occurred on board USS _____ on ____ August 19____. The Board will convene in USS _____ at 1000 on ____ August 19____ or as soon thereafter as practical.

2. The Board consists of you as senior member, and Captain _____, USN, and Captain _____, USN, as members. [Ordinarily, counsel for the board will not be appointed. If appointment of counsel is desired, do so here.]

3. The Board shall investigate all facts and circumstances surrounding the fire, including the cause of the fire, resulting injuries and damages, and any fault, neglect, or responsibility therefor. After deliberation, the Board must report its findings of fact, opinions, and recommendations by ____ September 19____, unless an extension is granted. The Board must express its opinion of the line of duty and misconduct status of any injured naval member. The Board should recommend administrative or disciplinary action, if appropriate. In particular, the Board's attention is directed to sections 0202e, 0213, 0215b, 0229, 0236 and appendix A-2-e of reference (a).

4. [When there is a potential claim against the United States either in admiralty or under the Federal Tort Claims Act, or if there is potential litigation against the United States, add the following language:] This investigation is appointed in contemplation of litigation and for the express purpose of assisting attorneys representing interests of the United States in this matter. You will contact (the Judge Advocate providing legal support) for direction and guidance as to those matters pertinent to the anticipated litigation.

5. By copy of this appointing order, LT Smith, Administrative Officer, is directed to furnish necessary administrative and clerical assistance for recording the proceedings and preparing the record.

A. B. SEA

Copy to: AdminO

**FORMAT FOR INVESTIGATIVE REPORT FOR INVESTIGATION
NOT REQUIRING A HEARING**

SSIC
Date

From: Lieutenant _____, U.S. Navy, 000-00-0000/1100
To: Commanding Officer

Subj: (SAME AS SUBJECT OF APPOINTING ORDER)

Ref: (a) JAG Manual

- Encl: (1) CO, _____, appointing order dated _____, (and any modifications thereto)
- (2) Summary of (or verbatim) sworn/unsworn testimony/statement of LCDR M. D. Slasher, MC, USN, 456-78-9012/2100, Naval Hospital, Newport, R.I.
 - (3) Summary of (or verbatim) sworn/unsworn testimony/statement of Mr. Harry Rhubarb, Sales Manager, AAA Computer Co., 174 Green St., Newport, R.I. 02840
 - (4) Statement of SN Dan P. Jones, USN, 234-56-7890, with signed Art. 31b, UCMJ, warning, Privacy Act warning
 - (5) Description of _____ (knife found at scene of the accident)
 - (6) Photograph of _____ depicting _____

[NOTE: The statement of each witness should be a separate enclosure to the investigative report. Enclosures containing testimony or statements of witnesses should precede enclosures in the form of other documents, descriptions of real evidence, photographs, etc.]

Preliminary Statement

Section 0214b of the JAG Manual lists the purposes:

- Procurement of evidence;
- whether the appointing order and all directives of the convening authority have been met;
- name and organization of any judge advocate consulted for assistance;
- nature of investigation (i.e. "An informal one-officer JAG Manual investigation was convened to inquire into the circumstances surrounding...");

- delay explained, extensions noted;
- limited participation by a member;
- When there is a potential claim against the United States either in Admiralty or under the Federal Tort Claims Act, or if there is potential litigation against the United States, the following language should be added to the preliminary statement: "This investigation is being conducted and this report is being prepared in contemplation of litigation and for the express purpose of assisting attorneys representing interests of the United States in this matter.";
- Calling attention to conflicting facts in the enclosure;
- the extent of compliance with rights warnings for injury/disease, Privacy Act, article 31 and "party" status; and
- any other information necessary to a complete understanding of the investigation.

Common errors:

- Including a synopsis of the facts (the preliminary statement is the wrong place for this - that is what the findings of fact are for);
- including opinions and recommendations; and
- including investigating officer's itinerary.

Sample Preliminary Statements

1. Pursuant to enclosure (1) and in accordance with reference (a), a one-officer JAGMAN investigation was conducted to inquiry into the circumstances surrounding a collision between Government vehicle 94-18021 and a privately owned vehicle which occurred at the intersection of U.S. highways 1 and 138, Newport, R.I., on or about 0900, 1 November 1985. All reasonably available relevant evidence was collected. The directives and special requirements articulated in enclosure (1) were met (except as noted below:).

2. While certain minor conflicts appear in the evidence, none was of sufficient degree or materiality to warrant comment. (While the testimony of witnesses A and B dramatically differed regarding which vehicle had the right of way, the testimony of witness A is considered to be the more creditable for the following reasons and was therefore relied upon to the exclusion of the testimony of witness B.)

3. All social security numbers contained in this report of investigation were obtained from official sources and were not solicited from the individual servicemember.

4. All enclosures attached hereto are either original documents or are certified to be true and accurate copies of the original documents they represent.

Findings of Fact

"Findings of Fact constitute an investigating officer's description of details of events based on evidence." JAGMAN, App. A-2-e(1). The use of the word "description" implies a fact-sifting process that falls short of opinion-making because direct evidence exists to support the sifted facts. Consider the following problem.

- Problem. Enclosures in our investigation reveal the following information. Mr. A (encl. (4)) states he had seen a vehicle speeding by him at 90 mph. Mr. A was almost hit by the car. Mr. A does not own a car, is 80 years of age, and has not driven since 1945. Mr. B, an off-duty police officer, also made a statement (encl. (5)). He states the car passed him, and he glanced at his speedometer. He was traveling at 35 mph. He estimates the speed of the car at 45 mph. Skid marks from the police report (encl. (6)) reveal that only 7 feet of skid marks on dry, smooth, asphalt pavement were necessary for the car to stop. How should the investigating officer record this information?
- Solution. Note the conflicting accounts in the preliminary statement as follows: "Two conflicting accounts of the speed of the vehicle in question appear in witnesses statements (encl. (4) and (5)), but only enclosure (5), the statement of Mr. B, is accepted as fact below because of his experience, ability to observe, and emotional detachment from the situation." Findings of fact should reflect only the investigating officer's EVALUATION of the facts: "That the vehicle left skid marks of seven feet in length in an attempt to avoid the collision. (encl. (6))." "That the skid marks were made on a dry, smooth, asphalt surface. (encl. (6))." "That the speed of the vehicle was 45 mph. at the time brakes were applied. (encl.(5))."
- Note that in some situations it may not even be necessary to reflect a discrepancy in the preliminary statement. In other situations, it may be impossible to ascertain a particular fact. If, in the opinion of the IO, the evidence does not support any particular fact, this difficulty could be properly noted in the preliminary statement: "The evidence gathered in the forms on enclosures (4) and (7) does not support a finding of fact as to the ..., and, hence, none is expressed."

- Only rarely will the conflict in evidence or the absence of it prevent the IO from making a finding of fact in a particular area. Thus, this should not be used as a escape for the IO who is either unwilling to evaluate the facts or too lazy to gather the necessary evidence.
- Each fact must be supported by evidence and should be numbered separately rather than grouped into a cumbersome, narrative form as the JAG Manual permits.
- An enclosure number should follow each finding of fact: "That the vehicle was traveling at 25 mph. [encl. (14), (15), (16)]." (Here all three enclosures support the finding of fact.)
- If an enclosure is lengthy, number the pages of each so the reviewer can find the information quickly: "That the vehicle was traveling at 25 mph. [encl. (14), p. 3; encl. (15), p. 7; encl. (16), p. 20]."

Opinions

Opinions may be required by the appointing order or other regulation. They are not factual evaluations, but rather logical inferences or conclusions drawn from the facts. In certain situations, although not necessary, reference to the underlying findings of fact or enclosures as a basis for each opinion may be helpful. Facts should be developed so as to render opinions self-evident. Consider the following examples.

1. That Seaman Apprentice Flynn's injuries were incurred in the line of duty and not due to her own misconduct [FF (9), (11), (12), (14)].

2. That Mr. Ganzel was acting within the scope of his employment at the time of the accident [FF (7), (10), (13)].

Recommendations

Recommendations will be made only when specifically directed in the appointing order. They should flow from the findings of fact and opinions. Consider the following example.

1. That the Government pursue a claim under the Medical Care Recovery Act against Mr. Tortfeasor for causing the injuries to Seaman Apprentice Flynn requiring naval medical treatment in the amount of \$2,348.76.

If a court-martial is recommended, a sworn charge sheet should normally be submitted as an enclosure. If a punitive letter of reprimand or admonition is recommended, a draft should be prepared and forwarded as an enclosure. If a nonpunitive letter is recommended, a draft should be prepared and separately

forwarded to the appropriate commander for issuance but should not be included as an enclosure to the JAG Manual investigation.

/s/ of IO
P. DRAKE

Copy to:

Provide copy to all interested commands. Do not make them via addressees. The adjudicating authority, typically the cognizant NLSO, gets a copy of all claims investigations. COMNAVSAFCEN gets a copy of all accident investigations. Send a copy to the parent command of any member who is involved in the investigation when they may need to take action, e.g., lost time entries for line of duty/misconduct determinations.

SAMPLE ENDORSEMENT OF THE CONVENING AUTHORITY
ON JAG MANUAL INVESTIGATION

COMMAND LETTERHEAD

FIRST ENDORSEMENT on LT _____'s ltr of _____

From: Commanding Officer, USS _____
To: Judge Advocate General
Via: Commander, [General court-martial convening authority]
(2) [Consult local directives]
(3) [CMC (JA) for Marine Corps investigations]

Subj: (SAME)

Ref: (b) _____

1. Returned for compliance with sections ____ and ____ of reference (a).

OR

1. Readdressed and forwarded.

* _____ has been advised of this incident by separate correspondence as required by reference (b) (if required by chain of command directives).

* By copy of this endorsement an advance copy of the basic correspondence is forwarded to _____ pursuant to section 0209e of reference (a). By copy of this endorsement a copy of the basic correspondence is being provided _____ for possible claims action in regard to recommendations _____, _____, and _____. _____ additional copies are forwarded herewith for the Judge Advocate General pursuant to section 0210c of reference (a).

* A Privacy Act record of disclosure sheet has been affixed before the first page of the report of investigation.

* Opinion _____ in the basic correspondence is not substantiated by the findings of fact because _____ and is therefore disapproved (modified to read as follows: _____).

* Recommendation _____ is not appropriate for action at this command; however, a copy of this investigation is being furnished to _____ for such action as may be deemed appropriate.

* The action recommended in Recommendation ____ has been accomplished by _____.

* The unauthorized absence of _____ at the time of his injury substantially and materially interfered with the performance of his duties.

2. Subject to the foregoing remarks, the proceedings, findings of fact, opinions and recommendations of the investigating officer are approved; specifically including the opinion that the injuries suffered by _____ were incurred in the line of duty and not due to his own misconduct.

SIGNATURE OF CONVENING AUTHORITY

Copy to:

* as appropriate

PRIVACY ACT STATEMENTS FOR INJURED SERVICEMEMBERS
IN JAG MANUAL INVESTIGATIONS
FOR LOD/MISCONDUCT AND CLAIMS PURPOSES

NAME: _____ RANK/RATE: _____

ACTIVITY: _____ UNIT: _____ TEL. NO: _____

Today, _____, 19____, I acknowledge that I have received the following advisement statements from _____.

PRIVACY ACT STATEMENT

This statement is provided in compliance with the provisions of the Privacy Act of 1974 (Public Law 93-579) which requires that Federal agencies must inform individuals who are requested to furnish personal information about themselves as to certain facts regarding the information requested below.

1. **Authority.** 5 U.S.C. § 301; 10 U.S.C. §§ 972(5), 1201-1221, 2733, 2734, 2734a, 2737, 5131-5153, 5947, 6148, 7205, 7622-7623; 28 U.S.C. §§ 1346, 2671-2680; 31 U.S.C. §§ 71-75, 240-243, 951-953; 37 U.S.C. § 802; 38 U.S.C. § 105; 42 U.S.C. §§ 2651-2653; 44 U.S.C. § 3101; 49 U.S.C. § 1901.

2. **Principal Purposes.** The information which will be solicited is intended principally for the following purposes:

a. Determinations on the status of personnel regarding entitlements to disability pay, disability benefits, severance pay, retirement pay, increases of pay for longevity, survivor's benefits, involuntary extensions of enlistments, dates of expiration of active obligated service, and accrual of annual leave;

b. determinations on disciplinary or punitive action;

c. determinations on liability of personnel for losses of, or damage to, public funds or property;

d. adjudication, pursuit, or defense of claims for or against the Government or among private parties;

e. other determinations, as required, in the course of naval administration;

f. public information releases; and

g. evaluations of procedures, operations, material, and designs by the Navy and contractors, with a view to improving the efficiency and safety of the Department of the Navy.

3. Routine Uses. In addition to being used within the Departments of the Navy and Defense for the purposes indicated above, records of investigations are routinely furnished, as appropriate, to the Veterans' Administration for use in determinations concerning entitlement to veterans and survivors benefits; to Servicemen's Group Life Insurance administrators for determinations concerning payment of life insurance proceeds; to the U.S. General Accounting Office for purposes of determinations concerning payment of relief of accountable personnel from liability for losses of public funds and related fiscal matters; and to the Department of Justice for use in litigation involving the Government. Additionally, such investigations are sometimes furnished to agencies of the Department of Justice and to State or local law enforcement and court authorities for use in connection with civilian criminal and civil court proceedings. The records of investigations are provided to agents and authorized representatives of persons involved in the incident, for use in legal or administrative matters. The records are provided to contractors for use in connection with settlement, adjudication, or defense of claims by or against the Government, and for use in design and evaluation of products, services, and systems. The records are also furnished to agencies of the Federal, State, or local law enforcement authorities, court authorities, administrative authorities, and regulatory authorities, for use in connection with civilian and military criminal, civil, administrative, and regulatory proceedings and actions.

4. Mandatory/Voluntary Disclosure/Consequences of Refusing to Disclose. Disclosure is voluntary. You are advised that you are initially presumed to be entitled to have the (personal determinations) (disciplinary determinations) (pecuniary liability to the Government) (medical claims liability assignment) listed above resolved in your favor, but the final determination will be based on all the evidence in the investigative record. If you do not provide the requested information, you will be entitled to a favorable determination if the record does not contain sufficient evidence to overcome the presumption in your favor. If the completed record does contain sufficient evidence to overcome the presumption in your favor, however, your election not to provide the requested information possibly could prevent the investigation from obtaining evidence which may be needed to support a favorable determination.

Signature

Date

PRIVACY ACT STATEMENTS FOR WITNESS
IN JAG MANUAL INVESTIGATION

NAME: _____ RANK/RATE: _____

ACTIVITY: _____ UNIT: _____ TEL. NO: _____

Today, _____, 19____, I acknowledge that I have received the following advisement statements from _____.

PRIVACY ACT STATEMENT

This statement is provided in compliance with the provisions of the Privacy Act of 1974 (Public Law 93-579) which requires that Federal agencies must inform individuals who are requested to furnish personal information about themselves as to certain facts regarding the information requested below.

1. **Authority.** 5 U.S.C. § 301; 10 U.S.C. §§ 972(5), 1201-1222, 2733, 2734-2734b, 2737, 5947, 6148, 7205, 7622-7623; 28 U.S.C. §§ 1346, 2671-2680; 31 U.S.C. §§ 71-75, 82a, 89-92, 95a, 240-243, 951-953; 37 U.S.C. § 802; 38 U.S.C. § 105; 42 U.S.C. §§ 2651-2653; 44 U.S.C. § 3101; 49 U.S.C. § 1901.

2. **Principal Purposes.** The information which will be solicited is intended principally for the following purposes:

a. Determinations on the status of personnel regarding entitlements to pay during disability, disability benefits, severance pay, retirement pay, increases of pay for longevity, survivor's benefits, involuntary extensions of enlistments, dates of expiration of active obligated service, and accrual of annual leave;

b. determinations on disciplinary or punitive action;

c. determinations on liability of personnel for losses of, or damage to, public funds or property;

d. evaluations of petitions, grievances, and complaints;

e. adjudication, pursuit, or defense of claims for or against the Government or among private parties;

f. other determinations, as required, in the course of naval administration;

g. public information releases; and

h. evaluations of procedures, operations, material, and designs by the Navy and contractors, with a view to improving the efficiency and safety of the Department of the Navy.

3. Routine Uses. In addition to being used within the Departments of the Navy and Defense for the purposes indicated above, records of investigations are routinely furnished, as appropriate, to the Veterans' Administration for use in determinations concerning entitlement to veterans and survivors benefits; to Servicemen's Group Life Insurance administrators for determinations concerning payment of life insurance proceeds; to the U.S. General Accounting Office for purposes of determinations concerning payment of relief of accountable personnel from liability for losses of public funds and related fiscal matters; and to the Department of Justice for use in litigation involving the Government. Additionally, such investigations are sometimes furnished to agencies of the Department of Justice and to State or local law enforcement and court authorities for use in connection with civilian criminal and civil court proceedings. The records of investigations are provided to agents and authorized representatives of persons involved in the incident, for use in legal or administrative matters. The records are provided to contractors for use in connection with settlement, adjudication, or defense of claims by or against the Government, and for use in design and evaluation of products, services, and systems. The records are also furnished to agencies of the Federal, State, or local law enforcement authorities, court authorities, administrative authorities, and regulatory authorities, for use in connection with civilian and military criminal, civil, administrative, and regulatory proceedings and actions.

4. Mandatory/Voluntary Disclosure, Consequences of Disclosure. Disclosure is voluntary. If you do not provide the requested information, any determinations or evaluations made as a result of this investigation will be made on the basis of the evidence that is contained in the investigative record.

Date

Signature

ARTICLE 31 WARNING

If, in the course of a JAG Manual investigation, any person is suspected of committing an offense under the UCMJ, the person should be advised of his rights under Article 31, UCMJ -- using this form -- before interviewing or questioning that person.

I have been advised that I may be suspected of the offense of _____ and that:

_____ a. I have the right to remain silent.

_____ b. Any statements I do make may be used as evidence against me in trial by court-martial.

_____ c. I have the right to consult with lawyer counsel prior to any questioning. This lawyer counsel may be a civilian lawyer retained by me at no expense to the government, a military lawyer appointed to act as my counsel without cost to me, or both.

_____ d. I have the right to have such retained civilian lawyer and/or appointed military lawyer present during this interview.

_____ e. I have the right to terminate this interview at any time.

WAIVER OF RIGHTS

_____ I further certify and acknowledge that I have read the above statement of my rights and fully understand them, and that:

_____ a. I expressly desire to waive my right to remain silent.

_____ b. I expressly desire to make a statement.

_____ c. I expressly do not desire to consult with either a civilian lawyer retained by me or a military lawyer appointed as my counsel without cost to me prior to any questioning.

_____ d. I expressly do not desire to have such a lawyer present with me during this interview.

_____ e. This acknowledgement and waiver of rights is made freely and voluntarily by me, and without any promises or threats having been made to me or pressure or coercion of any kind having been used against me.

_____/_____
(Witness' Signature) (Date)

_____/_____
(Signature) (Date)

Understanding the above, I wish to make the following statement (attach continuation page, if necessary):

GENERAL SAFETY REFERENCES

OPNAVINST 3120.32B	STANDARD ORGANIZATION AND REGULATIONS OF THE U.S. NAVY
OPNAVINST 3750.6P	THE NAVAL AVIATION SAFETY PROGRAM
OPNAVINST 5100.12F	NAVY SAFETY PRECAUTIONS FOR FORCES AFLOAT
OPNAVINST 5100.23B	NAVY OCCUPATIONAL SAFETY AND HEALTH PROGRAM
OPNAVINST 5102.1B	MISHAP INVESTIGATION AND REPORTING
NAVSAFECEN 5102/29	HANDBOOK FOR THE CONDUCT OF FORCES AFLOAT SAFETY INVESTIGATIONS
NAVSAFECEN 9077P5	SHIP SAFETY SURVEY GUIDE
NAVSUPPUB 4500	CONSOLIDATED HAZARDOUS ITEM LIST (CHIL)
NEPMU	SHIPBOARD OCCUPATIONAL HEALTH MANUAL VARIOUS CHAPTERS CONTAIN SPECIFIC SAFETY PRECAUTIONS
DOT-P5800.4	DEPARTMENT OF TRANSPORTATION PUBLICATION, HAZARDOUS MATERIALS EMERGENCY RESPONSE GUIDEBOOK
DOD 6050.5-LR	DOD HAZARDOUS MATERIALS INFORMATION SYSTEM HAZARDOUS ITEM LISTING
NAVSEA	SHIPBOARD HAZARDOUS MATERIALS/HAZARDOUS
S9593-A7-PLN-010	WASTE MANAGEMENT PLAN

CHAPTER 62

LINE OF DUTY AND MISCONDUCT DETERMINATIONS

6201 **GENERAL.** Per JAG Manual §§ 0213-0224, commanding officers are required to inquire into certain cases of injury or disease incurred by servicemembers and make what are referred to as line of duty/misconduct determinations. Opinions concerning line of duty are PROHIBITED in death cases. The type of inquiry and the degree of formality of the report will depend upon the circumstances of each case.

6202 **REQUIREMENT TO MAKE DETERMINATION.**
Commanders must make findings concerning line of duty (LOD) and misconduct in each case in which a servicemember incurs a "disease or injury" which:

1. MIGHT result in permanent disability; OR
2. which results in the physical inability to perform duty for a period exceeding 24 hours. Periods of hospitalization for evaluation or observation are excluded. Similarly, a return to "light duty" will stop this clock.

6203 **"LINE OF DUTY" DEFINED.** An injury or disease incurred by naval personnel while in active service is presumed to have been incurred "in line of duty," unless there is clear and convincing evidence that it was incurred while the member:

1. was in an unauthorized absence status which materially interfered with the performance of required military duties (typically, any absence in excess of 24 hours);
2. was in a desertion status;
3. was confined under sentence of a court-martial that included an unremitted dishonorable discharge;
4. was confined for a civilian felony conviction; or
5. As a result of the member's own misconduct, as defined below.

6204 **MISCONDUCT DEFINED.** The fact that the conduct violated a law, regulation, or order does not, of itself, constitute a basis for a determination

of misconduct. A servicemember's injury is presumed not to be the result of his own misconduct unless there is clear and convincing evidence that:

1. The injury was intentionally incurred; or
2. The injury was the result of gross negligence, demonstrating a reckless disregard for the foreseeable consequences.

6205 SPECIAL RULES

A. Intoxication. Intoxication may be produced by alcohol, a drug, or inhalation of fumes, gas, etc.

1. A member's intoxication at the time of the injury does not, standing alone, constitute a basis for a determination of misconduct, unless the investigation shows:

- a. The member's physical or mental faculties were impaired due to intoxication at the time of the injury;
- b. the extent of such impairment; AND
- c. that the impairment was THE proximate cause of the injury.

2. A blood alcohol concentration above .10 mg/dl will, in many cases, be sufficient to satisfy the first two elements. However, other evidence should be sought in determining whether or not there existed any physical impairment which directly contributed to the injury of the servicemember, e.g., the member's appearance, coordination, attitude, and coherence.

B. Refusal of Medical or Dental Treatment. If a member unreasonably refuses to submit to medical or dental treatment, any disability that proximately results from such refusal shall be deemed to have been incurred as a result of the member's own misconduct.

C. Venereal Disease. Any disability resulting from venereal disease is the result misconduct if the member has not complied with the regulations that require reporting and receiving treatment for such disease.

D. Mental Responsibility. All members are presumed to be mentally responsible. Consequently, that issue need not be addressed unless the nature of the act or the investigation reveals facts which call the member's mental responsibility into question. If so, the presumption is invalid and the member's mental responsibility must be shown by clear and convincing evidence. If the government

is unable to make this showing, an adverse finding cannot be made. Where the impairment of mental faculties is the result of the member's misconduct, however, (e.g., the illegal use of drugs) resulting injuries would be deemed to have been foreseeable consequences of the member's gross negligence, i.e., misconduct.

1. Suicide Attempts. Because of the strong instinct for self-preservation, an unsuccessful, but bona fide, attempt to kill oneself creates a strong inference of lack of mental responsibility.

2. Suicidal Gestures and Malingering. Self-inflicted injury, not prompted by a serious intent to die is at most a suicide gesture. Unless lack of mental responsibility is otherwise shown, resulting injuries are deemed to be the result of the member's own misconduct. The mere act alone does not raise a question of mental responsibility since there is member does not intend to take his own life. Instead, the intent is merely self-injury for the purpose of achieving some secondary gain, such as getting attention or avoiding duty.

6206 RELATIONSHIP BETWEEN MISCONDUCT AND LINE OF DUTY

A. Permissible Findings. A determination of "misconduct" always requires a determination of "not in the line of duty." Consequently, there are only three possible determinations:

1. In line of duty, not due to member's own misconduct (favorable);

2. Not in line of duty, not due to member's own misconduct (adverse);

or

3. Not in line of duty, due to member's own misconduct (adverse).

B. Disciplinary Action. An adverse determination as to misconduct or line of duty is not a punitive measure. Disciplinary action, if warranted, may be taken independently of any such determination. A favorable determination as to line of duty/misconduct also does not preclude separate disciplinary action nor is such a finding binding on any issue of guilt or innocence in any disciplinary proceeding.

C. Administrative Consequences. Adverse LOD/misconduct determinations may affect the servicemember's rights and eligibility for benefits.

1. Under 10 U.S.C. § 972, time lost due to the injury will extend the member's term of enlistment and will not count as creditable service toward any longevity and retirement multiplier.

2. Under 10 U.S.C. § 1207, the member may be ineligible for physical disability retirement or separation if the injury was intentional or resulted from willful neglect. In addition, the member will be ineligible if the disability was incurred during a period of unauthorized absence, regardless of its length or degree of interference with duties.

3. If the member's disease is a direct result of intemperate use of drugs or alcohol, the member may forfeit pay under 37 U.S.C. § 802.

4. Under 38 U.S.C. § 105, the member may be ineligible for VA benefits, including medical treatment eligibility.

6207 RECORDING LINE OF DUTY/MISCONDUCT DETERMINATIONS

A. Recording Options. When LOD/Misconduct findings must be made, they will be recorded in one of three ways:

1. JAGMAN Investigation. A factfinding body must be convened, and the commanding officer must make findings concerning misconduct and line of duty in any case in which:

a. The circumstances suggest an adverse LOD/misconduct finding might result;

b. A JAG Manual investigation is required for other reasons, e.g., possible claims ramifications; or

c. The commanding officer considers the appointment of a fact-finding body the appropriate means to ensure an adequate official record is made concerning the circumstances surrounding the incident.

2. Form Report. An injury report form (NAVJAG Form 5800/15) may be used when all of the following conditions are met:

a. A JAG Manual investigation is not required;

b. The medical representative and the commanding officer agree that the injury or disease was incurred "in the line of duty" and "not as a result of the member's own misconduct"; and

c. The injury or disease could result in a permanent disability.

3. Health and Dental Record Entries. Health and dental record entries suffice when:

- a. A JAG Manual investigation is not required;
- b. The medical representative and the commanding officer agree that the injury or disease was incurred "in the line of duty" and "not as a result of the member's own misconduct"; and
- c. The injury or disease is NOT likely to result in a permanent disability.
- d. In any case, even if a health and dental record entry would suffice, a form report may be made to JAG if there appears to be any reason for maintaining a record in that office.
- e. The form report will be sent to JAG via a GCMA for review.

6208

ACTION BY REVIEWING AUTHORITIES.

A. Convening Authority's Action. Unless the report is returned for further inquiry, the convening authority (CA) shall take one of the following actions:

1. If the CA concludes that such injury or disease was incurred "in line of duty" and "not due to a member's own misconduct" (or that clear and convincing evidence is not available to rebut the presumption of line of duty and not misconduct), this conclusion will be reflected in the endorsement of the record of proceedings. This action may be taken regardless of whether it differs from, or concurs with, an opinion expressed by the factfinding body.

2. If upon review of the report or record the CA (or higher authority) believes that the injury or disease of the member was incurred not in line of duty and/or due to his own misconduct, he MAY, BUT IS NOT REQUIRED to afford the member an opportunity to submit any desired information. If provided the opportunity to submit additional information, members shall be advised of their rights under Article 31, UCMJ and JAG Manual § 0215b using the form in the appendix following this chapter or JAG Manual appendix A-2-f.

3. If the report contains a LOD/Misconduct finding in a death case, the CA or reviewing authority will note the error and disapprove the opinion in the endorsement.

B. Service Record Entries. Prior to forwarding the report of investigation of an injury to a member which the CA has concluded was incurred not in line of duty, the CA should ensure that appropriate time lost, enlistment extension, and similar entries are made in the member's service and/or medical records. In the event the NLOD opinion is later disapproved by the officer exercising general court-martial convening authority, corrective entries can be made later.

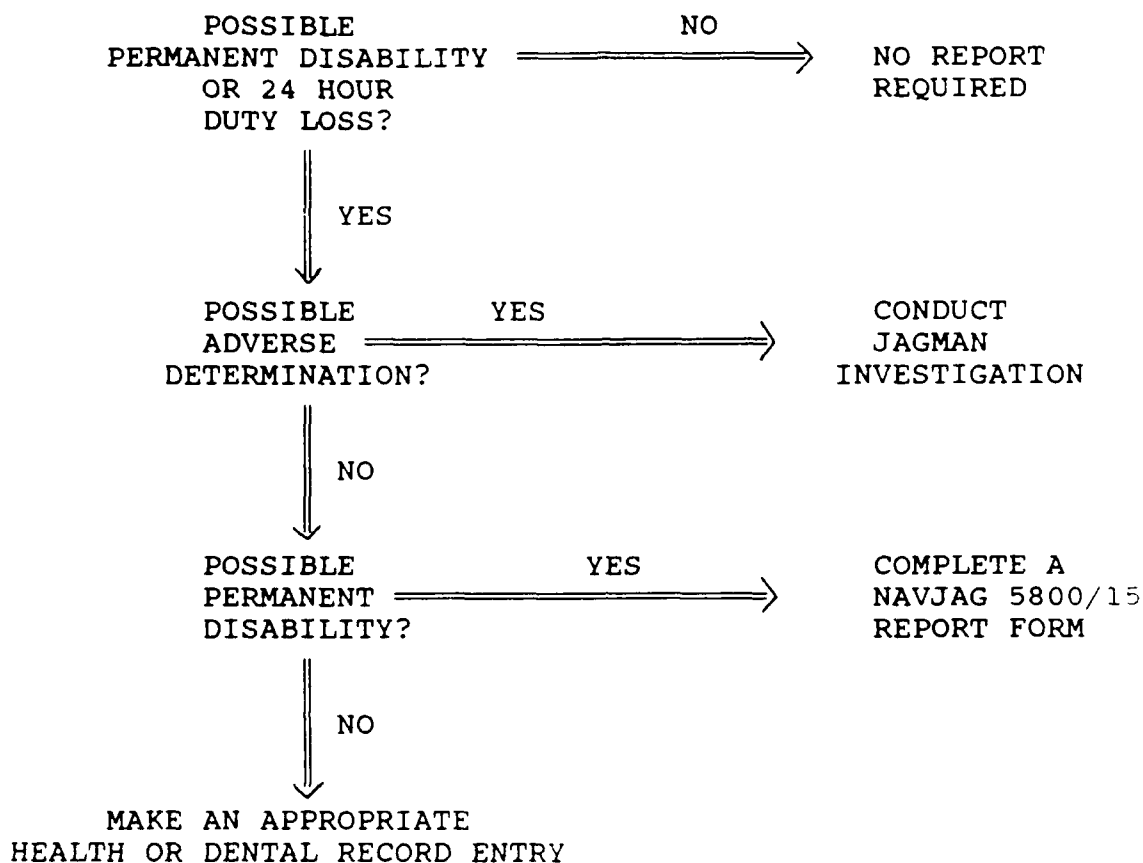
6209 **FORWARDING.** Unless the CA is empowered to convene general courts-martial, the record or report shall be forwarded to the general court-martial convening authority (GCMA).

A. General court-martial authority's action. The GCMA may take any action on the report that could have been taken by the CA. With respect to conclusions concerning misconduct and line of duty, the GCMA shall indicate approval, disapproval, or modification of such conclusions unless the record is returned for further inquiry. A copy of this action shall be forwarded to the commanding officer of the member concerned so that appropriate entries may be made in the service and medical records.

B. Subsequent reviews. Reviewing authorities above the GCMA need neither comment nor record approval or disapproval of the prior actions concerning line of duty and misconduct.

COMMON LOD/MISCONDUCT ERRORS

- A. Failure to forward LOD/misconduct cases via a GCM authority if findings are adverse or possible permanent disability exists.
- B. Failure to apply the correct burden of clear and convincing evidence when rebutting presumptions regarding, line of duty, misconduct, material interference, or mental responsibility.
- C. Failure to properly analyze the three "intoxication alone" criteria for finding misconduct.
- D. Failure to state the duty status of involved individuals.
- E. Failure to include Privacy Act statements, Article 31 warnings, or JAGMAN 0215b warnings, when required.
- F. Failure to determine whether hospitalization is for observation or treatment (if hospitalization for treatment is for less than 24 hours, or if hospitalization is for observation, no matter what the duration, and no permanent disability is likely, no LOD/misconduct determination is necessary).
- G. Failure to secure the GCMA's signature on the injury report form, NAVJAG 5800/15.
- H. Failure of the GCMA to make specific findings regarding LOD/misconduct, or to specifically concur in the subordinate's findings.
- I. Failure to include police reports in investigations.
- J. Failure to collect all available evidence in suicide attempt/gesture cases (e.g., a psychiatric interview).
- K. Failure to record the member's election regarding the opportunity to review the complete investigation before an adverse finding is approved, where the commander makes that discretionary offer.
- L. Failure to exclude portions of other privileged investigations from the JAG Manual investigation, e.g., AMIR, NIS, safety reports.

LOD/MISCONDUCT REPORTING FLOW CHART

COMPLIANCE WITH SECTION 0215b OF THE JAG MANUAL

I, _____, have been advised that:

____ Questions have arisen concerning whether or not my injury/disease, sustained or discovered on _____ 19____, was incurred in the line of duty and/or as the result of my own misconduct;

____ In the event such injury/disease is determined to have been incurred not in the line of duty or as a result of my own misconduct, I will be required to serve for an additional period beyond my present enlistment to make up for the duty time lost;

____ Lost duty time will not count as creditable service for pay entitlement purposes;

____ I may be required to forfeit some pay (where absence from duty in excess of one day immediately follows intemperate use of liquor or habit-forming drugs);

____ If I am permanently disabled and that disability is determined to have been a result of misconduct or was incurred while in an unauthorized absence status or otherwise not in the line of duty, I may be barred from receiving disability pay or allowances, as well as veterans' benefits;

____ I may NOT be required to give a statement relating to the origin, incurrence, or aggravation of any disease/injury that I may have.

(Items 1 through 5 below need only be completed if the individual is suspected of an offense which is punishable under the Uniform Code of Military Justice. The fact that the individual is suspected of having incurred his injury/disease as the result of his own misconduct and/or not in the line of duty does not necessarily mean that he is suspected of having committed an offense).

I further certify and acknowledge by my initials opposite each item that I have been advised as follows:

____ 1. That I am suspected of the following offense(s) which is (are) punishable under the UCMJ:

____ 2. That I have the right to remain silent.

____ 3. That any statement I do make may be used as evidence against me in a trial by court-martial.

____ 4. That I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at no expense to the government

or, if I wish, Navy or Marine Corps authority will appoint a military lawyer to act as my counsel without cost to me, or both.

___ 5. That I have the right to have such retained civilian lawyer and/or appointed military lawyer present during the interview.

___ 6. That I have the right to terminate the interview at any time.

I do/do not choose to submit evidence in refutation, explanation, rebuttal, or otherwise respecting the incurrence of my injury/disease. (If matters are submitted, they should be attached as enclosures to the investigative report).

Signature

Witness

Date

LINE OF DUTY/MISCONDUCT INVESTIGATION CHECKLIST

I. Identifying data on injured person/deceased/witness

- A. Name
- B. Sex and age
- C. Military
 - 1. Grade or rate
 - 2. Service number, if applicable
 - 3. Regular or Reserve
 - 4. Organization and armed force
 - 5. Experience/expertise, i.e., training, licenses, etc.
- D. Civilian
 - 1. Title
 - 2. Business or occupation
 - 3. Address
 - 4. Experience/expertise, i.e., training, licenses, etc.

II. Injury

- A. Date/time/place of occurrence
- B. Nature/extent of injury including description of body parts injured
- C. Place, extent, and cause of hospitalization of injured
- D. Status of injured: leave, liberty, unauthorized absence (UA), active duty, active duty for training, or inactive duty for training at time of injury
- E. Whether any UA status at time of injury materially interfered with his military duty

- F. Servicemember unable to perform duties for over 24 hours?
- G. Servicemember's injury possibly permanent?
- H. Training
 - 1. Formal/on the job
 - 2. Adequacy
 - 3. Engaged in tasks different from those in which trained
 - 4. Engaged in tasks too difficult for skill level
 - 5. Emergency responses/reaction time
- I. Supervision
 - 1. Adequate/lax
 - 2. Absent
- J. Physical factors
 - 1. Tired, Working excessive hours
 - 2. Hungry
 - 3. On medication, prescribed or unauthorized
 - 4. Ill or experiencing dizziness, headaches or nausea
 - 5. Exposed to severe environmental extremes
 - 6. Periods of alcohol or habit-forming drug impairment
 - a. Individual's general appearance, behavior, rationality of speech, and muscular coordination
 - b. Quantity and nature of intoxicating agent used
 - c. Period of time in which consumed
 - d. Results of blood, breath, urine or tissue tests for intoxicating agents

e. Lawfulness of intoxicating agent

K. Mental factors

1. Emotionally upset (angry, depressed, moody, tense)
2. Mentally preoccupied with unrelated matters
3. Motivation
4. Knowledge of/adherence to standard procedures
5. Mental competence
 - a. Presumption of sanity
 - b. Attempted suicide (genuine intent to die v. gesture or malingering)
 - c. Mental disease or defect (psychiatric eval)

L. Design factors

1. *Equipment's condition, working order*
2. Operating unfamiliar equipment/controls
3. Operating equipment with controls that function differently than expected due to lack of standardization
4. Unable to reach all controls from his work station and see and hear all displays, signals and communications
5. Provided insufficient support manuals
6. Using support equipment which was not clearly identified and likely to be confused with similar but noncompatible equipment

M. Environmental factors

1. Harmful dusts, fumes, gases without proper ventilation
2. Working in a hazardous environment without personal protective equipment or a line-tender

3. Unable to hear and see all communications and signals
4. Exposed to temperature extremes that could degrade efficiency, cause faintness, heart stroke or numbness
5. Suffering from eye fatigue due to inadequate lighting or glare
6. Visually restricted by dense fog, rain, smoke or snow
7. Darkened ship lighting conditions
8. Exposed to excessive noise/vibration levels

N. Personnel protective equipment

1. Using required equipment for the job, e.g., seatbelts, safety glasses, hearing protectors
2. Not using proper equipment due to lack of availability (identify)
3. Not using proper equipment due to lack of comfort or conflict with Rambo image (identify)
4. Using protective equipment that failed and caused additional injuries (identify)

O. Hazardous conditions

1. Inadequate/missing guards, handrail, ladder treads, protective mats, safety devices/switches, skid proofing
2. Jury-rigged equipment
3. Use of improper noninsulated tools
4. Incorrectly installed equipment
5. Defective/improperly maintained equipment
6. Slippery decks or ladders, obstructions
7. Improper clothing (leather heels, conventional shoes vice steel-toed shoes, loose-fitting clothes, no shirt, conventional eyeglasses vice safety glasses)

CHAPTER 63

FREEDOM OF INFORMATION ACT (FOIA)

6301 FOIA REFERENCES

- A. Freedom of Information Act, 5 U.S.C. § 552
- B. DoD Directive 5400.7 series
- C. SECNAVINST 5720.42E
- D. JAG Manual, Chapter V
- E. OPNAVINST 5510.161
- F. MCO 5720.56
- G. COMDINST M5260.2
- H. The Freedom of Information Reform Act of 1986 (Pub. L. 99-570)

6302 **PURPOSE.** The purpose of FOIA is to permit equal public access to agency records of the Federal government. Disclosure is the general rule. The burden of justifying nondisclosure is on the government.

6303 **ACTION ON RECEIPT OF THE REQUEST.** A command should immediately date-stamp and label the request as FOIA matter, and then ascertain who has cognizance over the requested agency record(s). Time is of the essence, as FOIA requires a written response to an FOIA request within 10 working days.

- A. Complete Requests. To be valid, a FOIA request must:
 - 1. Be in writing;
 - 2. mention FOIA, the statute, or naval directives;
 - 3. provide a description of the agency records requested from the command; and
 - 4. either enclose payment or make a promise to pay for search and duplication costs, per the fee schedule contained in SECNAVINST

5720.42D, unless a waiver is granted. [See the appendix to this section]

B. Incomplete Requests. Incomplete requests should still be answered promptly (within 10 working days of receipt) in writing and in a manner designed to assist the requester in obtaining the desired records. The command has discretion to waive technical defects in the form of an FOIA request if the requested information is otherwise releasable.

6304 **AN AGENCY RECORD IN EXISTENCE.** FOIA applies only to "records," i.e., information or products of data compilation, regardless of physical form or characteristics, made or received by a naval activity in the transaction of public business or under Federal law. Some examples of agency records that are naval records include memos, deck logs, contracts, letters, ADP storage, reports, and computer printouts. An extensive list of items not considered agency records is set forth in Chapter V of the JAGMAN.

A. In Existence. A record must exist and be in DoN possession and control to be subject to the provisions of SECNAVINST 5720.42 series. There is no obligation to create, compile, or obtain a record not already in existence.

B. Excluded Requests. Not all requests for information are governed by FOIA. Requests from Members of Congress are governed by SECNAVINST 5730.5 series. Requests from individuals for records pertaining to themselves are governed by the Privacy Act. Requests from GAO for records in connection with audits are governed by SECNAVINST 5741.2 series. Court orders or subpoenas demanding production of records, discovery, or testimony of witnesses are governed by Chapter VI of the JAG Manual.

C. Cognizance. A commander must have cognizance over the record requested to act on the FOIA request.

1. Common Referrals. Requests for NIS reports shall be readdressed and forwarded to the Director, Naval Security and Investigative Command, Washington, D.C. Requests for JAG Manual investigations shall be readdressed and forwarded to OJAG (Code 33). Requests for mishap investigation reports shall be readdressed and forwarded to the Commander, Naval Safety Center. Requests for reports by the Naval Audit Service shall be readdressed and forwarded to the Naval Audit Service Headquarters (Code OPS), and the requester notified of such referral.

2. Classified Records. If the existence or nonexistence of the requested record is classified, the activity shall refuse to confirm or deny its existence or nonexistence. If a request is received for documents classified by another agency, send the request to the appropriate agency and the requester notified of such referral,

unless the existence or nonexistence of the document is in itself classified. If a request is received for classified records originated by another naval activity for which the head of the activity is not the classifying authority, the request shall be forwarded to the official having classification authority and the requester notified of such referral, unless the existence or nonexistence of the record is in itself classified.

3. Forwarding Controls. Forward the request to cognizant activity expeditiously. Stamp the request, letter of transmittal, and the envelope or cover "FREEDOM OF INFORMATION ACT." Keep a record of the request, including the date and the activity to which it was forwarded. In all cases, notify the requester of the referral.

6305 **RELEASE POLICY**. Requested information must be released under FOIA unless: an exemption applies; AND the release would jeopardize government interest OR is prohibited by statute. If nonreleasable matters in a record are "reasonably segregable" from releasable portions, the releasable portions must be made available.

6306 **SPECIFIC EXEMPTIONS**. FOIA exemptions of primary interest to the SJA include:

A. Classified Documents. These records are exempt if currently and properly classified under OPNAVINST 5510.1 series.

B. Internal Personnel Rules and Practices. Documents relating to DoN internal personnel rules or practices may be exempt where release would substantially hinder the effective performance of a significant command function (e.g., advancement exams, audit or inspection schedules, etc.).

C. Exempt by Statute. Some statutes exempt classes of information and permit no discretion on the issue of disclosure, e.g., 42 U.S.C. § 2162 (restricted data); 18 U.S.C. § 798 (communication intelligence); 50 U.S.C. §§ 402(d)(8) - (9) (intelligence sources and methods); 21 U.S.C. § 1175 (drug abuse prevention/rehabilitation); and 42 U.S.C. § 4582 (alcohol abuse prevention/rehabilitation).

D. Inter/Intra-agency Memoranda. This exemption pertains to internal advice, recommendations, and subjective evaluations, rather than factual matters. The intent is to permit uninhibited discussion during the decisionmaking process. Examples of this exemption include, among other things, nonfactual portions of staff papers, after-action reports, records prepared for anticipated administrative proceedings or litigation, attorney-client privilege documents, attorney work-produce privilege documents, and Inspector General reports. If the record would be available through the discovery process in litigation with the Department of the Navy, then the record should not be withheld under this exemption. A directive or order from a superior to a subordinate, though contained in an internal communication, generally

cannot be withheld if it constitutes policy guidance or decision, as distinguished from a discussion of preliminary matters or advice.

E. Personnel and Medical Files. This exemption protects personnel, medical, and similar files from disclosure which would constitute a clearly unwarranted invasion of personal privacy. The "clearly unwarranted invasion" determination is a subjective judgment requiring a weighing of the privacy interest to be protected against the importance of the requester's purpose for seeking the information. Information that is normally released concerning military personnel includes name, grade, date of rank, gross salary, duty status, present and past duty stations, office phone, source of commission, military and civilian educational level, promotional sequence number, combat service and duties, decorations and medals, and date of birth. This exemption shall not be used to protect the privacy of a deceased person.

F. Investigatory Records and Information Compiled for Law Enforcement Purposes. This exemption applies only to the extent that the production of such records would: interfere with enforcement proceedings; deprive a person of a right to a fair trial; disclose the identity of a confidential source; disclose investigative techniques and procedures; or endanger law enforcement personnel.

6307 **FOR OFFICIAL USE ONLY (FOUO).** The FOUO designation is not a statutory exemption. Rather, this label is given to information, records, and other material which has not been given a security classification, but which contains information which may be withheld from the public under the exemptions discussed above. Records requiring the FOUO designation should be marked at the time of their creation to give notice of FOUO content and facilitate review once the record is requested under FOIA.

6308 **NAMES AND ADDRESSES.** The release of mailing lists is governed by section 0508 of the JAGMAN.

A. Names and Home Addresses. A request for home addresses and home telephone numbers without permission shall normally be denied as a clearly unwarranted invasion of personal privacy. Requests for home addresses (including barracks and government-provided quarters) may be referred to the last-known address of the individual for reply at the person's discretion. In such cases, requesters will be notified accordingly. A request for disclosure of a home address to individuals for the purpose of initiating court proceedings for the collection of alimony or child support, and to state and local tax authorities for the purpose of enforcing tax laws, would not be a request for a "list." Disclosure under these circumstances could be appropriate. However, care must be taken prior to release to ensure that a written record is prepared to document the reasons for the release determination.

B. Names and Duty Addresses. Requests for names and duty addresses of members attached to units that are stationed in foreign territories, routinely deployable, or operationally sensitive must be denied as clearly unwarranted invasions of personal privacy and as threats to security. Exceptions must be coordinated with CNO (OP-09B30) or CMC (MPI-10) as appropriate. Routinely deployable units include ships (except those undergoing extensive yard work), aviation squadrons, operational staffs, and all Fleet Marine Force units.

C. Release. Names and duty addresses not covered by the above are not exempt for release. Directories and organizational charts must also be released. No administrative burden exists if the requested materials are already in the form requested.

6309 **DENIAL.** While commanders can release information, FOIA requests may be denied only by the proper initial denial authority (IDA). All officers authorized to convene general courts-martial and the heads of various Navy Department activities listed in paragraph 6b of SECNAVINST 5720.42 series are designated as IDAs. The command should forward the FOIA request to the denial authority if: it cannot locate the requested agency record(s); there is a disagreement on a fee waiver; or the command does not want to release all of the agency records requested.

A. The IDA shall transmit his determination in writing to the requester within TEN working days after receipt by the appropriate activity. In unusual circumstances, the IDA may extend the time limit for responding to requests but in no event, may the period of extension exceed 10 additional working days without the requester's consent.

B. If the IDA determines that the requested record contains releasable information that is reasonably segregable from nonreleasable information, he shall disclose the releasable portion and deny the request as to the nonreleasable portion. A COMPLETE file of those FOIA requests which have been denied in full or in part should be maintained by the IDA.

C. The denial notification will specifically cite the exemption(s) upon which the denial is based, include a brief discussion of the governmental interest which would be jeopardized by disclosure, and advise the requester of the right to appeal to the SECNAV designee within 45 days.

6310 **APPEALS.** Any denial of requested information or fee waiver may be appealed. SECNAV has designated the Judge Advocate General and the General Counsel as appellate authorities. The General Counsel handles contracts, commercial law, and civilian personnel matters; OJAG handles military law, torts, and all other matters not under the cognizance of the General Counsel.

A. An appeal from an initial denial, in whole or in part, must be in writing and received by the appellate authority not more than 45 days following the date of transmittal of the initial denial. The appeal must state that it is an appeal under FOIA and include a copy of the denial letter. The appellate authority will normally have 20 working days after receipt of the appeal to make a final determination. There is a provision permitting a 10-working-day extension in unusual circumstances.

B. The appellate authority shall provide the appellant with a written notification of the final determination either causing the requested records, or the releasable portions thereof, to be released or, if denied, providing the name(s) and title(s) of the individual(s) responsible for such denial, the basis for the denial, and an advisement of the requester's right to seek judicial review.

6311 **REPORTING REQUIREMENTS.** Each agency must submit annual FOIA reports to Congress regarding the costs and time expended to administer the Act. Naval activities that are initial denial authorities will submit an annual FOIA report by 20 January of each year to the Chief of Naval Operations (OP-09B1P), while Marine Corps initial denial authorities will forward their report by 10 January of each year to the Commandant of the Marine Corps (Code PAP), who is then responsible for submitting a consolidated report to the Chief of Naval Operations. Units afloat and operational aviation squadrons are exempt from these annual reporting requirements if they have not received any FOIA requests during the reporting period. SECNAVINST 5720.42 series sets forth detailed instructions and the appropriate format for submitting these reports.

FOIA FEE COMPUTATION

The assessment and computation of fees depends on a number of factors. Generally, if the total charge is less than \$15.00, it will be waived for all requesters. Commands have discretionary authority to waive fees where disclosure of the information is in the public interest and not in the commercial interest of the requester. The fee schedule in para. 11, enclosure (2) of SECNAVINST 5720.42 series provides in part as follows:

Duplication costs

Printed material	\$.02 per page
Office copies	\$.15 per page
Microfiche	\$.25 per page

Manual search and (if chargeable) document review

Clerical (E-9/GS-8 or below)	\$12/hour
Professional (O-1-O-6/GS-9-GS-15)	\$25/hour
Executive (O-7, GS/GM-16, ES-1 or above)	\$45/hour

NOTE: Time is billed to the nearest 15 minutes.

Computer search: Bill for all direct costs of operating equipment in actual configuration used to satisfy the request, including time of programmers/operators actually involved in determining how to conduct search and those subsequently involved in executing the search.

Various noncommercial requesters receive, in addition, varying amounts of credit for search time and copies that are factored in before the waiver amount is applied. For the purposes of fees, there are four classes of requesters:

- a. Commercial requesters -- charged for search, duplication, and review;
- b. educational and noncommercial scientific institutional requesters -- charged only for duplication costs, with credit for 100 free pages of copies per request;
- c. news media -- treated the same as educational and noncommercial scientific institutional requesters; and
- d. other requesters (includes every requester not covered by a, b, or c above) -- charged only for search and duplication, subject to credit for 2 free hours of search time and 100 free pages of copies.

PRIVACY ACT

6312 REFERENCES

- A. Privacy Act, 5 U.S.C. 552a
- B. SECNAVINST 5211.5C
- C. MCO P5211.2
- D. JAG Manual, Chapter 5
- E. COMDTINST M 5260.2

6313 **PURPOSE.** The Privacy Act seeks: to safeguard personal information collected, maintained, used, and disseminated by the federal government; to provide a means by which an individual can gain access to and to correct federal records pertaining to them; and to prohibit the maintenance and use of secret files. The SJA will likely encounter Privacy Act issues in one of three situations: the government is collecting information; a member seeks to amend records; or a third-party asks the government for personal information from a system of records.

6314 **GOVERNMENT INFORMATION COLLECTION.** "Personal information" is information which is private, e.g., related to recreational, financial, or social matters, as opposed to information related solely to the individual's official duties. A "system of records" is one from which information can be retrieved by name, number, symbol, or other personal identifier.

A. Privacy Act Statement. When the government requests personal information for inclusion in a system of records, the individual must be informed of:

1. The authority for solicitation of that information (i.e., the statute or executive order);
2. all major purposes for which the relevant agency uses the information (e.g., pay entitlement, retirement eligibility, or security clearances);
3. the routine uses to be made of the information;
4. whether disclosure is mandatory or voluntary; and
5. the possible consequences for failing to provide the requested information.

B. The above information will be provided to the individual via the "Privacy Act Statement." The use of a written form is strongly recommended but not required. The appendix to Chapter V of the JAG Manual contains a blueprint from which tailored Privacy Act statements can be constructed.

6315 REQUESTS FOR ACCESS TO, OR AMENDMENT OF, ONE'S OWN RECORDS.

A. Personal Notification and Access. All properly submitted requests for notification, inspection, and copying one's own records will be honored, except in cases where exemption is authorized by law, claimed by the Secretary of the Navy [SECNAVINST 5211.5 series, enclosure (7)], and exercised by the denial authority. Fee schedules for duplication costs are contained in SECNAVINST 5211.5 series. Records which are exempt under the Privacy Act include:

1. Properly classified documents which are exempt under FOIA;
2. law enforcement investigations;
3. personnel evaluations;
4. test material for accession to federal government employment or promotion, if disclosure would compromise the testing process;
5. records relating to protective service for the President and others under 18 U.S.C. § 3056;
6. records required by statute to be maintained and used solely as statistical records; and
7. investigatory material compiled solely to determine suitability, eligibility, or qualification for Federal employment or military service, but only to the extent that disclosure would reveal the identity of a confidential source.

B. Amendment. The Privacy Act permits the individual to ensure that the records maintained about him are as accurate as possible by allowing him to amend information that is inaccurate, to appeal a refusal to amend, and to file a statement of dispute in the record should an appeal be denied. An individual seeking to amend records about himself must:

1. Accurately identify himself;
2. identify the system of records containing the pertinent information;

3. provide the information or personal identifiers needed to locate records in that particular system;
4. request amendment in writing from the system manager; and
5. state reasons for requesting amendment and provide information to support his request.

C. Action on Requests

1. A request for notification shall be acknowledged in writing within 10 working days. Determination and required action on initial requests for notification shall be completed, if reasonably possible, within 30 working days of receipt by the cognizant office.

2. If an available exemption is not exercised, an individual's request for amendment of a record pertaining to him shall be granted if it is determined, on the basis of the information presented by the requester and all other reasonably available records, that the requested amendment is warranted to make the record sufficiently accurate and complete as to ensure fairness in any determination which may be made on the basis of record. These provisions are not designed to permit collateral attack upon that which has already been the subject of a judicial or quasi-judicial action. If an amendment is made, all prior recipients of the record must be notified of the amended information.

D. Denial Authority. Denial authorities include all officers authorized to convene general courts-martial and the heads of designated Navy Department activities.

1. Notification. Denial authorities are authorized to deny requests for notification when an exemption is applicable and denial of the notification would serve a significant and legitimate governmental purpose (e.g., avoid interfering with an on-going law-enforcement investigation). The denial letter shall inform the individual of his right to request further administrative review of the matter with the Judge Advocate General (Code 34) within 120 days from the date of the denial letter.

2. Access. To deny the individual access to all or part of the requested record, the denial authority shall send an expurgated copy of the record available, where appropriate. When none of the record is releasable, the denial authority shall inform the individual of the denial of access and the reasons therefor (including citation of any applicable exemptions, a brief discussion of the significant and legitimate governmental purposes served by denial of the access, and an advisement of the right to seek further administrative review within 60 calendar days of the date of the denial.

3. Amendment. If the request to amend is denied in whole or in part, the denial authority must notify the individual of the basis for denial and advise him that he may request review of the denial within 120 days and the means of exercising that right.

E. Reviewing Authority. On receipt of a request for review of a determination denying an individual's initial request for notification, access, or amendment, the Judge Advocate General (or the General Counsel, depending on the subject matter) shall obtain a copy of the case file from the denial authority, review the matter, and make a final determination. Any final denial letter should cite the exemptions exercised and the legitimate governmental purposes served and inform the individual of the right to seek judicial review. If the official who reviews the denial also refuses to amend the record as requested, that official must notify the individual of his right to file a statement of dispute annotated to the disputed record, the purpose and effect of a statement of dispute, and the individual's right to request judicial review of the refusal to amend the record.

6316 **DISCLOSURE TO THIRD PARTIES.** Without the consent of the individual whose personal information is concerned, a record of that personal information cannot be disclosed to a third-party, unless an exception applies. The prior written consent or request of the individual concerned is NOT required if the disclosure of information is authorized under one of the eleven identified exceptions. The exceptions most pertinent to the SJA are discussed below.

A. Disclosure within DoD. Disclosure is authorized without the consent of the individual concerned, provided that the requesting member has an official need to know the information in the performance of duty and the contemplated use of the information is compatible with the purposes for which the record is maintained. No disclosure accounting is required.

B. FOIA. If the information is of the type that is required to be released pursuant to the Freedom of Information Act as implemented by SECNAVINST 5720.42 series, it may be released. Disclosure accounting is not required.

C. Routine Use. Disclosure may be made for a routine use and declared and published in the system notice in the Federal Register and Privacy Act statement. For example, a routine use for the home address information maintained in the Navy Personnel Records System is the disclosure of such information to the duly-appointed command family ombudsman in the performance of their duties.

D. Civil and criminal law-enforcement agencies of governmental units in the United States. The head of the agency making the request must do so in writing to the activity maintaining the record indicating the particular record desired and the law-enforcement purpose for which the record is sought. Blanket requests will not

be honored. A record may also be disclosed to a law-enforcement activity, provided that such disclosure has been established as a "routine use" in the published record-systems notice. Disclosure to a state child-support agency or a state bar association is authorized under this section. Disclosure to foreign law-enforcement agencies is NOT authorized under this section.

E. Emergency Conditions. Disclosure may be made if the health or safety of a person is imperiled. The individual whose record was disclosed must be notified of such disclosure.

F. Congress. Disclosure is permitted if information is requested by either House or any congressional committee or subcommittee to the extent of matters within its jurisdiction. Disclosure may also be made to an individual Member of Congress when the request for information was prompted by an oral or written request for assistance by the individual to whom the record pertains, or when the congressional office, after requesting information, subsequently states that it has received a request for assistance from the individual or has obtained his written consent for the disclosure of the information. Disclosure accounting is not required.

G. Courts. When complying with an order from a court of competent jurisdiction signed by a state or federal court JUDGE to furnish information, if the issuance of the order is made public by the court which issued it, reasonable efforts will be made to notify the individual to whom the record pertains of the disclosure and the nature of the information provided. If the court order itself is not a matter of public record, the concerned activity shall seek to learn when it will be made public. In this situation, an accounting for the disclosure shall be made at the time the activity complies with the order, but neither the identity of the party to whom the disclosure was made nor the purpose of the disclosure shall be made available to the concerned individual unless the court order has become a matter of public record.

H. Consumer Reporting Agency. Records concerning debts owed to the Federal government by an individual may be disclosed to consumer reporting agencies (e.g., credit bureaus) after the individual has been notified of the validated debt and afforded an opportunity to resolve the matter.

6317 **THIRD-PARTY DISCLOSURE ACCOUNTING.** Unless specified to the contrary in the pertinent paragraph above, each command must maintain an accounting record of all disclosures, including those based on the member's request or consent. The accounting record must include the date, nature and purpose of the disclosure, and the name and address of the recipient.

A. No particular accounting method is prescribed. A sample form is set forth in the appendix to chapter V of the JAG Manual. Whatever method is used, the disclosure accounting must be retained for at least five years after the last disclosure, or the life of the record, whichever is longer.

B. At their request, members must be told of all accountable disclosures except those made in the furtherance of law-enforcement activity. As mentioned above, even without his request, the individual must be informed of disclosures made under emergency conditions and those made pursuant to court order where the information is made public. If the individual amends the record, all prior recipients of information who are subject to disclosure accounting must be advised of the correction.

6318 **NJP RESULTS.** Within 30 days of holding an NJP, the command may publicize the mast as a deterrent. Publication must be within the command in a manner unlikely to reach civilian personnel and the public, i.e., the bulletin board, the plan of the day, announcement at morning quarters. The notice may specify the member's name, rate, offense, and punishment awarded. Do not release social security numbers. JAG Manual, § 0509.

6319 **REPORTING.** SECNAVINST 5211.5 series requires the Chief of Naval Operations to annually submit a consolidated Department of the Navy report to the Secretary of Defense. The report involves information on records systems maintained, systems exempted, and other information concerning administration of the Privacy Act. Denial authorities are required to submit similar reports to the Chief of Naval Operations through the appropriate chain of command. All activities subordinate to denial authorities are required to submit feeder reports to the denial authority in their chain of command by 1 February of each year. Units afloat and operational aviation squadrons are exempt from the reporting requirements described above, unless they have received Privacy Act requests -- in which case they are subject to the less formal reporting procedures set forth in paragraph 14a(4) of SECNAVINST 5211.5 series.

6320 **SANCTIONS FOR PRIVACY ACT VIOLATIONS**

A. **Civil Sanctions.** Civil sanctions apply to the agency (e.g., the Navy) involved in violations -- as opposed to individuals. Civil actions may be brought by individuals in cases where the Federal agency fails to adhere to the requirements of the Privacy Act and the individual is denied access, review, or is otherwise prejudiced.

B. **Criminal Sanctions.** Criminal sanctions apply to any officer or employee within the Federal agency who misuses a system or records by wrongful collection, maintenance, or disclosure of personal information. Violations must be willful; violators may be fined up to \$5,000.00

CHAPTER 64

STANDARDS OF CONDUCT AND GOVERNMENT ETHICS

6401 STANDARDS OF CONDUCT REFERENCES

- A. DoD Directive 5500.7 of 6 May 1987
- B. SECNAVINST 5370.2J
- C. SECNAVINST 1740.2D
- D. SECNAVINST 5720.44A

6402 **PURPOSE AND SCOPE.** The standards of conduct provide ethical standards for all DoN personnel. The primary reference, SECNAVINST 5370.2J, applies to the military (Regular and reservist, active or ACDUTRA or whenever performing a Federal function even if not on ADT) as well as to civilians (including nonappropriated fund activities personnel and special government employees). The key standards of conduct rules [appearing in boldface in the instruction] are punitive; military violations may be punished under the UCMJ and civilian violators are subject to disciplinary action.

6403 **ETHICS COUNSELORS.** Ethics counselors are responsible for providing advice and assistance on standards of conduct, ethics, conflicts of interest, and post-government service employment restriction issues. All SJAs serving GCMAAs are designated ethics counselors. Appendix E to SECNAVINST 5370.2J lists other ethics counselor billets in the naval service.

6404 **GENERAL POLICIES FOR ALL DON PERSONNEL.** 1A
DoN personnel must avoid any action that results in or reasonably can be expected to create the appearance of:

- A. Using public office for private gain;
- B. giving preferential treatment to any person or entity;
- C. impeding government efficiency or economy;
- D. losing independence or impartiality;
- E. making a Government decision outside official channels; or

- F. adversely affecting the confidence of the public in the integrity of the Government.

6405 **AFFILIATIONS AND FINANCIAL INTERESTS.** D o N
personnel shall not engage in personal, business, or professional activities nor hold a direct or indirect financial interest that conflicts with official duties and responsibilities. Unless expressly authorized, all DON personnel who have or acquire an affiliation or a financial interest that conflicts with their official duties shall report the matter to their appropriate superior in the chain of command.

A. For purposes of this rule, the private financial interests of an individual's spouse, minor child, immediate household member, or partner are considered the member's private financial interest. Conflicts of interest often arise in situations where servicemembers have official duties related to persons or business entities with which members of their immediate household are associated as employees, prospective employees, or stockholders.

B. The commander of the activity must resolve any conflict discovered. Corrective action may include disqualification from duties related to the conflict, change in duties, removal from the position, or transfer. Disqualification is not required, however, for financial interests in certain cases when the possibility of an actual conflict is remote, e.g., shares of a widely held and diversified mutual, money market, trust, or similar funds offered for sale by a financial institution; bank loans at generally available terms; and government bonds.

C. DoN personnel who are members or officers of nongovernmental associations or organizations must avoid activities on behalf of such groups that are incompatible with their official government positions.

1. Individuals are not disqualified from rendering advice or making recommendations within their chain of command on particular matters affecting private, nonprofit associations or organizations that foster and promote the general interests of the naval service and which depend upon the voluntary leadership efforts of DoN personnel if:

- a. Such individuals disclose their interest or affiliation to their superior prior to rendering advice or making recommendations;
- b. the final decision is made by higher authority; and
- c. the individual's commander does not otherwise find disqualification to be necessary.

2. For additional policy guidance in this Private Associations area, see SECNAVINST 5760.4_.

D. The Office of Government Ethics promulgated an interim procedural rule (55 Federal Register 14407, 18 April 1990) for the issuance of certificates of divestiture, which permit the nonrecognition of gain upon the disposition of property to comply with conflict of interest requirements. Section 1043 of the Internal Revenue Code was enacted as part of the Ethics Reform Act of 1989. The OGE rule provides a certificate of divestiture may be issued (pursuant to the procedures specified) upon a determination that such divestiture by an executive branch official (or spouse or dependent thereof) is reasonably necessary to comply with 18 U.S.C. § 208 or any other Federal conflict of interest statute.

6406 OUTSIDE EMPLOYMENT

DoN personnel shall not engage in any outside employment activity, with or without compensation, that:

A. Interferes with or is not compatible with the performance of their Government duties;

B. may reasonably be expected to bring discredit upon the Government or the Department of the Navy; or

C. is otherwise inconsistent with the requirements of the instruction.

1. Commanders and individuals must assess each outside activity individually and prohibit those which can reasonably be expected to create the appearance of impropriety.

2. Commanders may require all individuals in their commands desiring to engage in outside employment to obtain advance permission.

3. There are many limitations on outside activities in Federal statutes and regulations, including:

a. Enlisted naval personnel on active duty cannot leave their post to engage in a civilian pursuit, business, or professional activity if it interferes with the customary or regular employment of local civilians in their art, trade, or profession.

b. DoN personnel cannot receive pay or allowances from any source other than the United States for the performance of any official service or duty unless specifically authorized by law. Officers on active duty (except while on terminal leave) may not accept employment if it requires separation from their organization, branch, or unit, or otherwise interferes with the performance of military duties.

6407 **COMMERCIAL USE OF GOVERNMENT GRADE, RANK, TITLE, POSITION OR UNIFORM.** Naval personnel shall not use, or permit the use of, their grade, rank, title, position, or uniform to promote any commercial enterprise or to endorse any commercial product. Members cannot indicate support for any private enterprise, whether commercial or not, where such support is or appears to be equivalent to preferential treatment or official endorsement. Retired military personnel and members of Reserve components not on active duty, however, may use their military titles in connection with commercial enterprises if they indicate clearly their inactive or retired status, the use does not discredit DoN or DoD, and the use does not give the appearance of DoD or DoN sponsorship. This exception is subject to the control of DoN commanders in foreign countries who may limit or eliminate the exception in areas under their jurisdiction to avoid confusing foreign governments or nationals.

6408 **COMMERCIAL DEALINGS INVOLVING DON PERSONNEL.** DoN personnel shall not knowingly solicit or make solicited sales to DoD personnel who are junior in rank, grade, or position, or their family members, at any time, on or off duty. Per SECNAVINST 1740.2D, members may not make commercial solicitations to their peers. In addition, Article 1111, U.S. Navy Regulations, 1990, prohibits officers from having any pecuniary dealings with enlisted personnel except as required in the performance of official duties.

A. This rule seeks to eliminate the appearance of coercion, intimidation, or pressure from rank, grade, or position in private dealings. While this standards of conduct rule prohibits a senior from making a solicited sale to a junior or to the junior's family, sales made because a junior approaches the senior and requests the sale be made are not prohibited.

B. In the absence of actual coercion, intimidation, or pressure, this prohibition does not include:

1. The sale or lease of privately-owned real or personal property not held for commercial or business purposes; and
2. sales in commercial establishments by members working part-time on their off-duty hours.

6409 **GIFTS TO SUPERIORS.** DoN personnel shall not give any contribution or gift to a superior or to the superior's immediate family, nor solicit from a subordinate or accept any gift or contribution from a subordinate or the subordinate's immediate family, unless the gift meets the below criteria. Under 5 U.S.C. § 7342, a Government civilian employee is subject to removal from the Civil Service for either soliciting a contribution from another employee as a gift to an

official superior, making a donation as a gift to an official superior, or accepting a gift from an employee receiving less pay than the recipient.

A. Voluntariness. Gifts must be made voluntarily. If the gift is made by individual contributions, each contribution must be voluntary. Charging each member's mess bill or O' Club account are not practices which promote voluntariness.

B. Value. The value of the gift must be reasonable under the circumstances. This facet of the rule operates as a flexible ceiling with a maximum of \$300.00. This maximum applies to all gifts tendered to mark an occasion; gifts may not be broken down by groups of donors to circumvent the rule. If the gift is purchased with contributions, the contribution of any member cannot exceed \$10.00.

C. Special Occasions. Gifts may be made only on significant personal occasions which do not recur, e.g., marriage, transfer out of chain of command, retirement, death of a family member, illness. In addition, promotions are NOT appropriate occasions for gifts to superiors.

6410 GIFTS OR GRATUITIES FROM OUTSIDE SOURCES.

Neither members nor their immediate families may solicit, accept, or agree to accept any gratuity for themselves or others, either directly or indirectly, from a defense contractor. A defense contractor is any entity that is engaged in or seeks, to do business with, is regulated by, or whose economic interests are substantially affected by DoD.

A. Unless a specific exception to this general prohibition permits a gratuity to be accepted, DoN personnel must refuse it. Even if accepting a gift is permissible under a liberal reading of one of the exceptions, it should be refused if an appearance of impropriety is created by accepting it. Gratuities may never be solicited. A gratuity may violate the rule despite the absence of the donor's intent to influence a matter pending before the receiving official. For DOT regulations governing this area for Coast Guard personnel, see 49 C.F.R. Part 99, Employee Responsibilities and Conduct. DoN personnel who receive gratuities under circumstances not covered by SECNAVINST 5370.2J, must report the matter in writing to their commander via the cognizant ethics counselor for appropriate action and disposition.

B. Exceptions. The general rule does not prohibit:

1. Acceptance of unsolicited advertising or promotional items that have less than \$10.00 retail value;
2. acceptance of trophies, entertainment, prizes, or awards for public service or achievement in an individual, rather than official, capacity;

3. acceptance of prizes or awards in games or contests that do not relate to official duties and are open to a broad segment of the public or approved for DoN participation;
4. acceptance of discounts, benefits, or concessions realistically available to the general public or all DON personnel, provided that such discounts or concessions are not used to obtain any item for the purpose of resale at a profit;
5. participation by DoN personnel in civic and community activities when the involvement of DoD contractors is remote from the business purposes of any contractor sponsoring, supporting, or participating in the activity;
6. activities engaged in by senior officials of a DoN component, commanders, or their representatives, with local civic leaders as part of a DoN community relations program authorized by SECNAVINST 5720.44A, DoN Public Affairs Policy and Regulations;
7. acceptance of food and drink (not transportation or lodging) in connection with participation in widely attended gatherings of mutual interest to Government and industry, sponsored or hosted by institutions of higher learning or industrial, technical, or professional associations, [associations' programs must have been approved under DoD Instruction 5410.20];
8. participation by naval personnel in public ceremonial activities of mutual interest to industry or local communities and DoN, e.g., ship launchings, with command approval;
9. attending vendor training sessions when the vendor's products or systems are provided under DoD contract, the training facilitates use of those products or systems by DoN personnel, and the appropriate supervisor determines that the training is in the best interests of the Government, as long as the contractor waives any claim against the Government for such training and the Government not the contractor determines who can go;
10. continued participation in employee welfare or benefit plans of a former employer when permitted by law and approved by the appropriate supervisor with advice of the cognizant ethics official or counselor;
11. customary exchanges of gratuities between DoN personnel and their friends and relatives when the relationship is the motivating factor for the gratuity [not paid for by the government or any DOD contractor];
12. accepting benefits resulting from the business activities of a spouse, offered in the normal course of the spouse's employment rather than due to the member's status;

13. on an infrequent basis only; accepting coffee, donuts, and similar refreshments of nominal value offered as a normal courtesy incidental to the performance of duty; or

14. situations in which, in the sound judgment of the individual concerned or their supervisor, the Government's best interests are served by the individual participating in activities otherwise prohibited. This last exception is not a "catch-all." The burden of decision and accountability is placed on the member. In each such case, a written report of the circumstances must be submitted in advance or, when an advance report is not possible, within 48 hours, by the individual to the commander via the appropriate ethics counselor.

6411 GIFTS TO DON FROM OUTSIDE SOURCES

A. Gifts to DoN and DoN Commands. The acceptance of gifts of real or personal property made to the DON is governed by SECNAVINST 4001.2F and MCO 4001.2B. These instructions implement several statutory provisions, identify the "acceptance authorities," and specify acceptance criteria. A sample memorandum to the acceptance authority is provided in the appendix to this chapter.

B. Gifts from Foreign Governments. Gifts or gratuities to federal officials from foreign governments, without the consent of Congress, are prohibited by Article 1, section 9 clause 1 of the U.S. Constitution. Members may not solicit or encourage gifts, decorations, or awards from a foreign government.

1. Congress has, however, consented to acceptance by military personnel of gifts of "minimal value." Minimal value is currently set by GSA at \$200.00. 41 C.F.R. § 101-49.001-5. Under the guidelines of 5 U.S.C. § 7342, foreign gifts in the nature of medical treatment or educational scholarships may also be accepted, even above minimal value.

2. Members should refuse gifts having a U.S. retail value above "minimal value." If refusal of the gift would likely cause offense or embarrassment or otherwise adversely affect U.S. foreign relations, the member may take temporary possession of the gift and process it for acceptance. If a tangible gift is accepted for this reason, it will be accepted on behalf of the U.S. and would become U.S. property. Recipients may ask to take the property on the command account for local custody and display. If the property is accepted and destined for disposal by GSA, the intended recipient may ask for the opportunity to bid on the property at any later public auction.

3. Gifts in the form of travel (or travel expenses) taking place outside the U.S. must be consistent with U.S. interests and be approved by the agency, department, or office by which the government employee is employed.

C. **Foreign Decorations.** All decorations, awards, and gifts from foreign governments to U.S. naval military and civilian personnel, and their spouses and dependents, must be processed under the procedures outlined in chapter 7 of SECNAVINST 1650.1E, United States Navy and Marine Corps Awards Manual. That instruction permits the receipt and retention of table favors, mementos, remembrances, or other tokens bestowed at official functions and other gifts of "minimal value" received as souvenirs or marks of courtesy from a foreign government.

6412 **SPEAKING, LECTURING, WRITING AND APPEARANCES.** DoN personnel shall not engage in speaking, lecturing, or writing activities that are dependent on information obtained as a result of their government employment. This rule contains the general prohibition against using inside information for the benefit of oneself or for others. The issue of compensation here is irrelevant. This rule does not preclude members from writing or speaking on matters in which they have developed expertise because of their DoN experience. The sole exceptions to the general rule are when the information does not focus specifically on the agency's responsibilities, policies and programs, and:

A. The information has been published or is generally available to the public, e.g., FOIA; or

B. SECNAV gives written authorization to use nonpublic information, deeming it to be in the public interest.

6413 **HONORARIA.** As of 1 January 1991, DoN personnel may not accept honoraria or suggest charitable contributions in place thereof, for ANY speech, article, or appearance, regardless of whether the activity is related to the performance of official duties.

A. An honorarium is ANY payment of money or other thing of value (excluding expenses for travel, subsistence and agent fees or commissions) to DoN personnel as consideration for an appearance, speech, writing, or presentation.

B. A "speech" is any oral presentation, regardless of whether made in person, recorded, or broadcasted. An "appearance" is attendance and making remarks at any conference, convention, or similar gathering. An "article" is a writing intended for publication but does not include books, fiction, poetry or scripts. Teaching is outside employment, not a speech or an appearance. These rules, however, cannot be circumvented by maintaining that one has a part-time job in the speech-making or article-writing business.

C. Government officers and employees are prohibited under 18 U.S.C. § 209 from accepting any contribution or supplementation of salary for the performance of official duties from any source other than the United States. Therefore, DoN

personnel are prohibited from receiving compensation for lectures or articles which focus specifically on DoN's responsibilities, policies, and programs, or when it may be perceived by the public that the article or speech conveys DoN policies, or when the activity interferes with the individual's official duties. If preparing or delivering a speech, writing, or other work was properly assigned by a superior, or was properly self-assigned within the context of one's position or billet description, the speaker or writer cannot accept compensation for doing so, even if the work was prepared and delivered outside of normal working hours.

D. Prior to publishing or delivering any work or speech pertaining to military matters, national security issues, or subjects of significant concern to DoD, DoN authors or speakers must ensure that cognizant DoN authorities have reviewed it and cleared it for dissemination. In general, each such work must be reviewed for both security and policy. For detailed guidance, see SECNAVINST 5720.44A.

6414 **TRAVEL AND TRANSPORTATION.** Naval personnel and members of their immediate household shall not solicit or accept in-kind transportation or accommodations or reimbursement for transportation or travel-related expenses from, or on behalf of, a DOD contractor. Exceptions to the general rule include:

A. Accepting such services, payments, or reimbursements from a potential employer in connection with a job interview [reporting requirements must be met]; and

B. situations in which the recipient is on official Government business and reports the circumstances in writing to his superior and ethics counselor before accepting, if possible, or as soon as possible thereafter and accepts:

1. Space-available, previously scheduled, ground transportation to, from, or around a contractor's place of business provided by the contractor to its own employees; or

2. contractor-provided transportation, meals, or overnight accommodations when arrangements for government or commercial transportation, meals, or accommodations are clearly impracticable [read "impossible"] and refusing the contractor's offer would interfere significantly with the performance of official duties.

6415 **NON-DOD CONTRACTOR TRAVEL EXPENSE PAYMENTS.** DoN personnel shall not accept from any non-DoD source transportation, accommodations, or subsistence in connection with official travel unless:

- A. The recipient is a speaker, panelist, project officer, or other bona fide participant in a seminar, symposium, or similar event;
- B. the recipient obtains prior command approval in writing;
- C. the transportation, accommodations, or subsistence are provided IN KIND;
- D. the provider is a nonprofit, tax-exempt organization, association, or institution listed in 26 U.S.C. § 501(c)(3) or authorized by 5 U.S.C. § 4111; and
- E. the transportation, accommodations, or subsistence are not extravagant or excessive.

6416 **AGENCY ACCEPTANCE OF NONFEDERAL TRAVEL PAYMENTS.** GSA has issued interim travel regulations creating new executive branch rules governing acceptance by agencies and departments of gifts from non-government sources for travel and travel related expenses. 56 Fed. Reg. 9878-81. Effective 6 March 1991, all travel and travel related gifts in excess of \$250 accepted under this authority must be reported semiannually (on 31 May and 30 November) to the Director, Office of Government Ethics (OGE). Gifts may be accepted from conflicting nonfederal sources including defense contractors, only when the proper acceptance authority, as defined in SECNAVINST 4001.2F, determines that the benefit of the attendance or participation by the employee and/or spouse outweighs concern for the potential appearance of undue influence. In cases where specific requirements can be met, the new rules also provide authority for agency acceptance of travel expenses of a spouse accompanying an employee. All approval and acceptance under the new regulations must occur prior to proposed travel. When the circumstances require expeditious acceptance, the request for approval may be forwarded to the acceptance authority in message format.

6417 **PROMOTIONAL BENEFITS IN CONNECTION WITH OFFICIAL TRAVEL.** Navy personnel may accept, but must surrender to their commanding officer or designee, promotional items or benefits such as "frequent flyer" airline tickets, coupons, dividends, seat upgrades, etc. "Credits," miles, "points," etc. accumulated in commercial airline frequent-flyer clubs or programs pursuant to official travel may be used to obtain free travel for OFFICIAL purposes. If additional travel is considered impractical, mileage points may be redeemed to upgrade accommodations from "coach" to "first-" or "business-" class on later official flights.

6418 **GAMBLING.** While on Government owned or controlled property, or while on duty for the government (i.e., not on leave or liberty), members shall not participate in any gambling activity. Gambling is any game of chance to win a prize

which requires an entry fee. Gambling includes lotteries, pools, raffles, door prizes, wagers, etc. Exceptions to this rule, other than those listed below, may be authorized by SECNAV on a case-by-case basis. Forward requests via the chain of command, including CNO or CMC as appropriate, and include a complete statement of local gambling laws, proposed administrative controls, and a copy of the proposed implementing order. Recognized exceptions to the gambling proscription include:

- A. activity specifically authorized by SECNAV, e.g., the Navy Relief raffle;
- B. activities otherwise authorized by law, e.g., the sale on DoD premises of state lottery tickets by blind vendors;
- C. bingo, under regulations promulgated by CNO or CMC; and
- D. the use of certain gambling devices overseas.

6419 **USE OF TITLE, RANK, OR POSITION TO RAISE FUNDS FOR CHARITIES.** DON personnel shall not use or allow the use of their titles, rank, or positions in connection with charitable or nonprofit organizations. This prohibition does not preclude volunteer efforts on behalf of charitable or nonprofit organizations by individuals acting in a private capacity. In addition, DoN personnel may assist specifically authorized charitable programs: Combined Federal Campaign, United Way, and Navy Relief. Similarly, members may make speeches before such organizations if the speech is designed to express an official position in a public forum.

6420 **USE OF INFORMATION**

A. Inside Information. Current and former naval personnel shall not use, directly or indirectly, inside information to further a private gain for themselves or others. "Inside information" is information about the business of the Navy or the Marine Corps which is:

- 1. Not generally available to the public and not releasable to the public under a Freedom of Information Act request; and
- 2. was obtained by virtue of an individual's DOD position.

B. Acquisition Information. Current AND FORMER naval personnel shall not release any information concerning proposed acquisitions or purchases by any DOD contracting activity, except per authorized procedures. Naval personnel, other than contracting officers, shall not make any commitment or promise relating to the award of a contract nor make any representation that could reasonably be construed as such a commitment. This rule bars the unauthorized release of acquisition data even if no gain or benefit to the discloser or another person is contemplated.

6421 **USING OFFICIAL POSITION.** Naval personnel shall not use their official positions to improperly induce, coerce, or influence any person, particularly subordinates, defense contractors, and potential defense contractors, to provide any benefit, financial or otherwise, to themselves or to others.

6422 **FUNDRAISING REFERENCES**

- A. DODDIR 5035.1
- B. SECNAVINST 5340.1_
- C. SECNAVINST 4001.2E
- D. SECNAVNOTE 5340

6423 **GENERAL FUNDRAISING POLICY**

A. Preferential Treatment. DoN policy is that support of fundraising activities must not result in, or create an appearance of, giving preferential treatment to any organization or person. If one organization is afforded support, the command must be prepared to give similar support to similarly situated organizations. This policy does not apply to fundraising support for the Combined Federal Campaign, Navy and Marine Corps Relief, a disaster appeal approved by the Office of Personnel Management or an approved Olympic event.

B. Fundraising for commercial interests. DoD policy prohibits government participation in events clearly sponsored by, or conducted for the benefit of, commercial interests.

C. Solicitation Generally. Unless authorized by the Secretary of the Navy, requests for contributions for DoN organizations shall not be initiated by DoN personnel. Naval personnel are not permitted, without proper authority, to augment appropriated funds through outside resources.

D. Voluntariness. Where solicitation is authorized, the request must be made in an environment and manner which ensures that contributions are in fact voluntarily made. Any actions that do not allow free choices or create the appearance that servicemembers do not have a free choice to give any amount, or not to give at all, are prohibited. The coercive practices prohibited by this rule include:

1. Supervisory solicitation of supervised employees;
2. setting 100 percent participation goals;

3. providing or using contributor lists for purposes other than the routine collection and forwarding of contributions and pledges or in the alternative, developing or using noncontributor lists;

4. establishing mandatory personal dollar goals or quotas; and

5. "counseling" or grading individual service personnel or civilian employees about their failure to contribute or about the size of their donation.

E. On-the-job solicitations for the combined federal campaign. Servicemembers have the opportunity through a single on-the-job solicitation to make truly voluntary contributions to such charitable health and welfare agencies within the local Combined Federal Campaign as they desire to support. Such solicitations shall be conducted in strict conformity with guidelines published annually.

6423 **OFF-THE-JOB SOLICITATIONS (EXCLUDING NAVY AND MARINE CORPS RELIEF).** Such solicitations are limited to those organizations who do not elect to participate in on-the-job solicitations and are subject to the following guidelines.

A. Family Quarters on Military Installations. Voluntary agencies may be permitted to solicit at private residences or at family quarters in unrestricted areas of military installations at the discretion of the local installation commander. Similarly situated organizations must be afforded the same privilege.

B. Public Entrances of Federal Buildings and Installations. Voluntary agencies that engage in limited or specialized methods of solicitation, including, but not limited to, the sale of token items, may be permitted to solicit at public entrances or at public concourses of federal buildings or installations that are normally open to the general public.

C. Duty Status. Solicitations shall not be conducted by military or civilian personnel in their official capacities, whether on or off duty. DoN personnel shall not use or allow the use of their titles, grades, or positions in connection with fundraising for private organizations. Unless specifically authorized, personnel shall not wear the uniform while engaged in off-the-job solicitation for any purpose from the public.

D. Collection Boxes. Collection boxes for the purely voluntary donation of goods to assist worthy causes may be placed in offices and other work spaces at the direction of the local commander.

6424 **NAVY RELIEF DRIVE.** The Secretary of the Navy publishes the 'Navy Relief Society Annual Call for Contributions' and specifically establishes the guidelines under which the campaign is to be conducted.

6425 **FUNDRAISERS CONDUCTED BY MORALE, WELFARE, AND RECREATION (MWR) ACTIVITIES** Fundraising events may be held in support of MWR activities provided: (a) All members or patrons of the sponsoring MWR activity must be authorized patrons; (b) Fundraising activities must be conducted entirely on Federal property; (c) Solicitations must be restricted to authorized patrons; and (d) All proceeds from the fundraising event must be used by the sponsoring MWR activity solely for the benefit of authorized patrons. Strict limitations apply to use of golf-courses and bowling alleys for fundraising.

6426 **OTHER FUNDRAISING ACTIVITIES.** Service public affairs manuals authorize participation in limited public fundraising events: (a) military support organizations (e.g. USO); (b) local, community-wide programs (e.g. volunteer fire departments, rescue units or youth activity funds); and (c) the Olympic and Pan American Games.

6427 **PRIVATE INTEREST DISCLOSURE SYSTEM.** There are two separate DoN private interest disclosure systems: the Confidential Statement of Affiliations and Financial Interests (DD Form 1555); and the Financial Disclosure Report (SF 278).

A. Confidential Statement of Affiliations and Financial Interests (DD Form 1555). For DD Form 1555, members must report the interest of a member of their immediate household as if it were their own. Personnel who file an SF-278 need not file a DD Form 1555. Personnel who must file a DD Form 1555 include:

1. Regular Navy and Marine Corps officers frocked to 0-7, and Reserve Navy and Marine Corps officers frocked to 0-7 serving on voluntary extended duty in excess of 130 days;

2. commanding officers and executive officers Navy shore installations with 500 or more military and civilian personnel (including foreign national and indirect-hire personnel regularly attached, but excluding personnel attached for duty under instruction) and all Marine Corps installations;

3. DoN civilian personnel classified at GS/GM-15 or below and military personnel below the grade of 0-7, when their official responsibilities require them to exercise judgment in making decisions or taking actions regarding contracting or procurement, regulation or audit of private or nonfederal enterprises, or other activities in which final decision or action may economically affect the interests of any nonfederal activity;

4. special government employees (except those excluded in SECNAVINST 5370.2J, e.g., doctors, dentists, chaplains), and

5. those DoN personnel serving in positions for which the commander concerned determines this disclosure report should be filed.

B. Financial Disclosure Report (SF-278). Individuals who must initially and then annually, file the second of the two main disclosure reports, the Financial Disclosure Report (SF-278), include:

1. Regular Navy and Marine Corps officers who have been promoted (not frocked) to O-7, or above;

2. Reserve Navy and Marine Corps officers serving on voluntary extended active duty in excess of 130 days who have been promoted (not frocked) to O-7 or above; and

3. members of the Senior Executive Service.

C. Filing

1. DD Form 1555. The report must be filed initially on assuming the billet and thereafter annually by 31 October. Commanders must notify filers and give them a form by 30 September. The member files the report with their appropriate supervisor. Ethics counselors assist commanders in reviewing new or revised billets to determine whether filing is required or appropriate.

2. SF-278. New entrants must file before assuming the billet or grade triggering the requirement. Annual reports must be submitted between 1 January and 1 May. Termination reports must be submitted within 15 days before or 30 days after leaving the billet requiring submission of a report. All Navy filers must submit their SF-278 to JAG via their appropriate supervisor and ethics counselor. Marine filers submit their SF-278 to SJA to CMC, Headquarters, U.S. Marine Corps, unless their position requires a different submission chain [outlined in SECNAVINST 5370.2J]. Personnel in joint billets may have to file duplicate reports. Late filers are subject to a \$200 penalty fee.

D. Review. Both the DD Form 1555 and the SF-278 report are initially reviewed by both the individual's appropriate supervisor and the ethics counselor. If there is a disagreement between those individuals concerning whether there is or may be a conflict, based on the information provided on DD Form 1555, the filing individual's commanding officer or activity head will resolve the matter or forward the report to the cognizant deputy ethics official for resolution. A sample memorandum of caution appear in the appendix to this chapter.

E. Retention All DD Form 1555s and SF-278s must be retained for six years. DD Form 1555s are kept at the command or activity to which the reporting individual was assigned when the report was filed; SF-278s are kept at JAG or CMC (JA).

6428 SEARCHING FOR POST-GOVERNMENT SERVICE EMPLOYMENT

Depending on the nature of their work, members leaving active duty for private employment, particularly with defense contractors, face a labyrinth of statutes and regulations. The intricacy of these rules and the frequency with which they change preclude detailed analysis here. Judge advocates should pose their questions to OJAG (Code 13) at (703) 614-1781 or CMC (JAR) at AV 224-2532.

6429 POST-GOVERNMENT SERVICE REPORTING REQUIREMENTS

A. Report of Defense Contractor Employment (DD Form 1787). DD Form 1787 is the reporting mechanism which drives enforcement of 10 U.S.C. § 2397b, the "revolving door" statute. Personnel must file a DD Form 1787 within 90 days of beginning private employment if they:

1. Leave the service in pay grade O-4 or above and have more than 10 years of service (need not be retired) or attained pay rate GS-13 at any time during the 3 years preceding the end of their DoD service;
2. work for a major defense contractor [i.e., a company having more than \$10 million in defense contracts during the previous year as listed in 32 C.F.R. Part 40a] during the 2-year period following release from active duty; and
3. are employed at a RATE of more than \$25,000 annually [One need not work for a full year; a former member who makes \$3,000 for one month's work must file.]

B. Statement of Employment (DD Form 1357). All retired Regular officers of the Navy and Marine Corps whose names have been on the retired list for 3 years or less must file a statement of employment (DD Form 1357) to advise the DON of that former officer's post-retirement employment activities. The initial statement of employment must be submitted within 30 days of retirement, and again within 30 days if that employment changes. After 3 years the use of that form is encouraged, but not mandatory unless that former officer is employed by the federal government.

SAMPLE GIFT FORWARDING LETTER

5800

2 Feb 89

MEMORANDUM FOR THE COMMANDING GENERAL

Subj: OFFER OF GIFT

Ref: (a) MCO 4001.2A

Encl: (1) CO, MCAS, Iwakuni ltr 4001 ASD of 18 Jan 89
(2) Iwakuni OWC ltr of 12 Jan 89

1. By the enclosure, the Commanding Officer, Marine Corps Air Station, Iwakuni forwards a gift of \$1,779.90 from the local Officers' Wives Club for the station Child Development Center. I recommend you accept this gift on behalf of the Marine Corps.
2. This gift was not solicited. The value of the gift is within your authority to accept under the reference. Acceptance of this gift will not result in embarrassment to the Marine Corps. The donor has not placed any conditions on the gift other than using the money to enhance the Child Development Center. Acceptance of this gift will not create any expectation of reciprocal benefit for the donor. The donor does not do or seek business with the government.
3. I recommend you accept the gift. If you concur, we will coordinate its deposit with CMC (FD), notify the commander, and ensure he sends an appropriate letter thanking the donor.

Very respectfully,

S. J. ADVOCATE

CG Decision: Approved _____

 Disapproved _____

SAMPLE MEMORANDUM OF DISQUALIFICATION

MEMORANDUM FOR

Subj: FINANCIAL DISCLOSURE REPORT (SF-278) OR OD FORM 1555

Ref: (a) SECNAVINST 5370.2J, Standards of Conduct and Government Ethics

Encl: (1) List of reported holdings involving defense contractors

1. According to reference (a), your Financial Disclosure Report dated ____ has been reviewed.
2. Your report reveals that you, your spouse, minor child, or a member of your household hold a financial interest in one or more entities that do business with the Department of the Navy. Comparing these reported holdings to your assigned duties as _____ it is concluded that your responsibilities require your participation in matters involving, directly or indirectly, the firms identified in enclosure (1). Therefore, as required by reference (a), you are hereby disqualified from taking any action in connection with matters involving these firms.
3. As a result of this disqualification, you and, by copy of this memorandum, your immediate subordinates, are directed to refer to me all official matters involving the firms listed in enclosure (1) (and their subsidiaries and affiliates) that would normally come to you for action.
4. You are advised that in accordance with reference (a), your Financial Disclosure Report has been forwarded to _____, the cognizant Deputy Ethics Official, for final review.

F. P. ADAMS
Commander, Naval Sea Systems Command

Copy to:
(Immediate subordinates)

Received by: [Involved Employee]
Date: _____

3 Dec 90

MEMORANDUM FOR THE COMMANDING OFFICER

From: Civil Law

Via: (1) Executive Officer

Subj: PROCUREMENT INTEGRITY CERTIFICATION

Ref: (a) Attached E-Mail

Encl: (1) Certifications

1. XO asked me to review the reference. I am convinced the term "procurement official" includes you, the XO, and Ms. Turner. In an abundance of caution given the broad definition of that term, I recommend we interpret it to apply as well to Mr. MacFarlane and Lt Sawyer.

2. Should you concur, proposed memoranda for the affected individuals are enclosed. Once signed, the certificates must be sent to Code 64.

Very respectfully,

S. R. THOMAS

SAMPLE PROCUREMENT OFFICIAL CERTIFICATION DOCUMENTS

MEMORANDUM

From: Commanding Officer
To: Colonel David Charles USMC

Subj: PROCUREMENT OFFICIAL CERTIFICATION

Ref: (a) The Office of Federal Procurement Policy Act, Title 41,
U.S. Code, Section 423, as amended by Section 814 of
Public Law 101-189

Encl: (1) OGE Memo of 31 Oct 90
(2) Procurement Official Certification

1. I have determined that the duties and responsibilities of your position, like my own, subject you to the certification requirements of reference (a) that took effect on 1 December 1990. All individuals subject to certification must review the information contained in enclosure (1) and indicate their understanding and compliance by signing enclosure (2), the Procurement Integrity Certification and the attached Privacy Act Notice.
2. This must be done before performing any procurement functions on or after 1 December 1990. If you have any questions, Major Thomas stands ready to assist you. Return the signed certification to Ms. Regina for forwarding to Code 64.

Respectfully,

PHIL ARPOTT
Captain, JAGC, USN
Commanding Officer

PROCUREMENT INTEGRITY CERTIFICATION
FOR PROCUREMENT OFFICIALS

As a condition of serving as a procurement official, I,

hereby certify that I am familiar with the provisions of Subsections 27 (b), (c), and (e) of the Office of Federal Procurement Policy Act, Title 41, U.S. Code, Section 423, as amended by Section 814 of Public Law 101-139. I further certify that I will not engage in any conduct prohibited by such subsections and will report immediately to the contracting officer any information concerning a violation or possible violation of Subsections 27 (a), (b), (d) or (f) of the Act and applicable implementing regulations. A written explanation of Subsections 27 (a) through (f) has been made available to me. I understand that, should I leave the Government during the conduct of a procurement for which I have served as a procurement official, I have a continuing obligation under section 27 not to disclose proprietary or source selection information relating to that procurement and a requirement to so certify.

Signature of Procurement Official

Date

Department or Agency

Office Telephone Number

Name of Procurement Official

Social Security Number

* * * * *

PRIVACY ACT NOTICE TO EMPLOYEES AND OFFICIALS

In accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a), the following notice is provided:

AUTHORITY FOR THE COLLECTION OF INFORMATION: 41 U.S.C. 423 and Executive Order 9397.

Your signature on the Optional Form 333, Procurement Integrity Certification for Procurement Officials, and disclosure of your Social Security Number on this form, are voluntary, but possible effects upon you if the certification is not submitted and a Social Security Number is not provided include the following:

Disqualification from a particular work or duty assignment, or from a position for which you are signed or which you currently hold, or other appropriate action, or administrative delay in processing your certification.

PRINCIPAL PURPOSE FOR COLLECTION OF THIS INFORMATION:

To obtain and maintain a completed certification from any person designated as a "procurement official," as defined by 41 U.S.C. 123 and applicable procurement regulations.

ROUTINE USES WHICH MAY BE MADE OF THE COLLECTED INFORMATION:

Transfers to Federal, state, local or foreign agencies when relevant to civil, criminal, administrative, or regulatory investigations or proceedings, including transfer to the Office of Government Ethics in connection with its program oversight responsibilities, or pursuant to a request by any appropriate Federal agency in connection with hiring, retention, or grievance of an employee or applicant, the issuance of a security clearance, the award or administration of a contract, the issuance of a license, grant, or other benefit, to committees of the Congress, or any other use specified by the Office of Personnel Management (OPM) in the system of records entitled "OPM/GOVT-1 General Personnel Records," as published in the Federal Register periodically by OPM.

FRAUD, WASTE AND ABUSE HOTLINE COMPLAINTS AND WHISTLEBLOWERS

6430 REFERENCES

- A. SECNAVINST 5430.92A
- B. SECNAVINST 5370.5A
- C. SECNAVINST 5370.2J
- D. MCO 7510.4A

6431 **NAVAL INSPECTOR GENERAL.** NAVINSGEN is the focal point for receipt and tasking to appropriate Naval organizations of all DoD referred and Navy Hotline allegations. NAVINSGEN maintains records and controls necessary to ensure that hotline complaints are properly investigated. NAVINSGEN forwards progress and final reports on DoD Hotline referrals relating to cognizant Navy organizations to DoD. Navy organizations tasked with examining hotline allegations must comply with the responsibilities specified in SECNAVINST 5370.5A and pertinent local directives. The completed results of such examinations are reported to NAVINSGEN via the chain of command which reviews the reports to ensure full compliance, directing corrective action when appropriate.

6432 **INVESTIGATION.** Substantive allegations referred through the DoD or Navy Hotline Programs are normally be examined within the traditional chain of command structure. Commanders must ensure that standards of independence, completeness, timeliness, and accountability are met.

A. Independence. In all matters relating to an investigation, the individual or the organization performing the inquiry must be free from all impairments to independence. Not only must the investigation BE independent, the impartiality of every facet of the investigation must be apparent to knowledgeable third parties.

1. An investigator's impartiality may be taxed by official, professional, personal, or financial relationships, pre-conceived opinions, or biases. Similarly, factors external to the individual can restrict the ability to conduct an independent investigation, e.g., the authority to overrule or to influence the extent and thoroughness of the investigation and the content of the completion report. The lack of independence can be attributed as well to an individual's or an organization's position within the chain of command. Since complete assurance of impartiality and objectivity is necessary, allegations must be examined by officials outside and independent of the operation specified in the complaint. When the complaint alleges fraud or mismanagement in a discrete unit of a command, e.g., the Supply

Department, and there is no indication that the commanding officer or other key management officials were aware of or in some manner directly responsible for the alleged impropriety, the complaint may be referred to the command concerned. On the other hand, the independence standard would dictate that an allegation against a commanding officer be investigated by someone outside that command.

2. In any investigation, independence is the key standard by which an inquiry will maintain its objectivity. Investigations which demonstrate a lack of independence will not be accepted by NAVINSGEN or DoD. Examination and inquiry relating to hotline allegations may be conducted by qualified auditors, inspectors, and investigators. The assistance of others with special professional or technical skills may be used when warranted. In any event, the designated examiner must meet basic selection criteria, e.g., sufficient seniority, maturity, professional experience, and independence in the matter under inquiry, as if appointed for a JAGMAN investigation.

B. Completeness. Completion reports must thoroughly address all relevant aspects of the investigation. Progress and completion reports must clearly and concisely reflect the results of the investigator's efforts. Reports should state the facts in a straightforward manner. A quality report will be logically organized, accurate, and make sense. Reports should be brief, i.e., no longer than necessary to communicate the relevant findings clearly and accurately. All reports should record or reference pertinent interviews and should reflect what the investigation accomplished. This information should include fines, savings, recoveries, indictments, convictions, proposed/actual suspensions or removal actions, management recommendations, or other actions taken directly as a result of the investigation. Systemic weaknesses or management problems disclosed in the investigation must also be reported. Reports must not raise unanswered questions nor leave matters open to question or misinterpretation.

C. Timeliness. Investigations are to be conducted and completion reports forwarded to NAVINSGEN in a timely manner. NAVINSGEN will refer all DoD and Navy Hotlines promptly to the appropriate echelon II command or directly to a field activity for investigation where highly sensitive or time critical matters are involved. The organization or individual tasked with the investigation is responsible for ensuring the due date is met. Paragraph 7 of SECNAVINST 5370.5A specifies time limits for meeting the completion report deadline to NAVINSGEN and actions to be taken when either the DoD or Navy Hotline deadline cannot be met.

D. Accountability. Commanders must hold their subordinates accountable for their actions and correct systemic faults. Appropriate remedial measures shall be taken against individuals found to have committed unlawful or inappropriate acts, or acts which have created the appearance of impropriety. Such measures may be educational, corrective, administrative, or punitive and must always be appropriate and proportionate to the act. SJAs can provide guidance on the

lawfulness of proposed remedial action. The Defense Navy Hotline Completion Report shall contain a statement of all action taken. NAVINSGEN will not close a case involving a substantiated allegation until action is taken and reported.

6433 GENERAL PROVISIONS

A. Retention of Documents. All working papers and files, excluding personal notes of a criminal investigator, resulting from the inquiry into the hotline complaint will be retained at the originating activity for two years following closing action by the tasking activity. Such papers and files are to be made available immediately upon request DoD or Navy auditors, inspectors, or investigators.

B. Reference to the JAG Manual. In addition to adhering to the prescribed investigative standards, personnel charged with the conduct of a hotline examination may refer to the JAG Manual, as the Navy's standard guideline for conducting an inquiry or investigation. The checklists and general information in that chapter of this Deskbook may likewise be helpful.

C. Informants. Informants under the DoD and Navy Hotline Programs are assured confidentiality to encourage full disclosure of information without fear of reprisal. Normally, hotline users are encouraged to identify themselves so that additional facts can be obtained if necessary. To protect the identity of DoD and Navy Hotline users who have been granted confidentiality to the maximum extent possible, NAVINSGEN shall be the point of contact when such identity is required by the investigator assigned to conduct that examination. In those instances where NAVINSGEN discloses the source, the identity shall be protected to the utmost of the investigator's capabilities.

E. Program Publicity. Commands are required to provide the widest dissemination of the Hotline programs within their areas of responsibility. To assist in this effort, Hotline Posters are available through the Naval Publications and Forms Center.

F. Reporting instances of suspected fraud, waste, or abuse is the responsibility of all naval personnel. Toll-free numbers are available to report suspected violations. Those numbers are 1-800-

1. 424-9098 (DOD);
2. 424-5454 (GAO);
3. 533-3451 (DON) (also use: A/V 288-6743 for DON; A/V 224-2172 for USMC IG);
4. 356-3464 (NAVSEA IG);

5. 424-9071 (DOT IG);
6. 528-5429 (USAF); and
7. 448-0000 (USA).

DEFENSE NAVY HOTLINE COMPLETION REPORTFE-1-111111

1. Name of Official(s) Conducting the Audit, Inspection, or Investigation.
2. Rank and/or Grade of Official(s).
3. Duty Position and Contact Telephone Number of Official(s).
4. Organization of Official(s).
5. Hotline Control Number.
6. Scope of Examination, Conclusions, and Recommendations:
 - a. Identify the allegations, applicable organization and location, person or persons against whom the allegation was made, dollar significance of actual or estimated loss or waste of resources.
 - b. Indicate the scope, nature, and manner of the investigation conducted (documents reviewed, witnesses interviewed, evidence collected, and persons interrogated). The report shall reflect whether inquiries or interviews were conducted by telephone or in person. The identity of the person interviewed need not be reflected in the report but must be documented in the official field file of the examining agency. Reports must indicate whether individuals cited in the allegation were interviewed. The specific identity and location of pertinent documents reviewed during the course of the investigation shall be recorded and reflected in the report. Procurement history data shall be reflected in those complaints of excessive price increases in spare parts.
 - c. Report findings and conclusions of the investigating official. This paragraph may include program reviews made, comments as to the adequacy of existing policy or regulation, system weaknesses noted, and similar comments.
7. Criminal or Regulatory Violation(s) Substantiated:
8. Disposition: For investigations involving economies and efficiencies, report management actions in the final report. For investigations involving unlawful acts, provide the results of prosecutions including details of all charges and sentences. Include the results of administrative sanctions, reprimands, value of property or money recovered, or other deterrent actions.
9. Security Classification of Information: When applicable, the investigating organization must determine and state the security classification of information in the report.
10. Location of Field Working Papers and Files:

DEFENSE NAVY HOTLINE PROGRESS REPORT
AS OF ()

1. Applicable DoD Component: Department of the Navy
2. Hotline Control Number:
3. Date Referral Initially Received:
4. Status
 - a. Name of organization conducting investigation.
 - b. Type of investigation being conducted.
 - c. Results of investigation to date (summary).
 - d. Reason for delay in completing investigation.
5. Expected Date of Completion:
6. Action Agency Point of Contact (POC)
 - a. Name of POC:
 - b. Duty telephone number:

6434 **WHISTLEBLOWING.** Whistleblowing is the lawful disclosure to the Special Counsel, an Inspector General, agency officials or others, of information which the discloser reasonably believes evinces the following type of wrongdoing:

- A. A violation of any law, rule or regulation; or
- B. gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

6435 **PROHIBITED PERSONNEL PRACTICES.** Under the Civil Service Reform Act, federal agency heads, managers, supervisors and personnel officials are responsible for preventing prohibited personnel practices, including reprisal for whistleblowing, and for complying with and enforcing civil service laws, rules and regulations. A personnel action (such as an appointment, promotion, reassignment, suspension, etc.) may need to be involved before there can be a prohibited personnel practice. Federal employees may file complaints of prohibited personnel practices with the OSC. The complaints will be investigated and, if the evidence warrants, the violation will be corrected, prosecuted, or both. Under the law, any employee who can take, direct others to take, recommend or approve any personnel action may not:

- A. Discriminate based on race, color, religion, sex, national origin, age, handicapping condition, marital status or political affiliation;
- B. solicit or consider employment recommendations based on factors other than personal knowledge of records of job related abilities or characteristics;
- C. coerce the political activity of any person;
- D. deceive or willfully obstruct any person from competing for employment;
- E. influence any person to withdraw from competition for any position to improve or injure the employment prospects of any person;
- F. give unauthorized preference or advantage to any person to improve or injure the employment prospects of any particular employee or applicant;
- G. engage in nepotism (hire or promote or advocate the hiring or promotion of relatives within the same agency component);
- H. take or threaten to take a personnel action against an employee for any disclosure of information which the employee reasonably believes

evidences a violation of law, rule or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

- I. take or threaten to take a personnel action against an employee for the exercise of an appeal right;
- J. discriminate based on personal conduct which is not adverse to on-the-job performance of the employee, applicant or others; or
- K. violate any law, rule or regulation which implements or directly concerns the merit system principles.

6436 **THE OFFICE OF SPECIAL COUNSEL (OSC).** The OSC is an independent investigative and prosecutorial agency designed to protect employees, former employees, and applicants for employment from prohibited personnel practices, especially reprisal for whistleblowing. Originally, under the Civil Service Act of 1978, OSC was part of the Merit System Protection Board (MSPB). The Whistleblower Protection Act of 1989 made OSC an independent entity to enhance its status as a resource for federal employees. The OSC serves as a conduit between a federal employee whistleblower and the affected agency by referring information of wrongdoing to the agency while affording anonymity to the employee. The OSC is not authorized to conduct the actual investigation of whistleblowing disclosures, but may require the concerned agency to investigate and report the results of the investigation for transmittal to the President, Congress, and the employee.

A. OSC Responsibilities. The OSC's three basic areas of statutory responsibility are:

1. Providing a secure channel through which information evidencing a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety may be disclosed without fear of retaliation and without disclosure of identity except with the employee's consent;
2. receiving and investigating allegations of prohibited personnel practices and other activities prohibited by civil service law, rule or regulation and, if warranted, initiating corrective or disciplinary action; and
3. enforcing the Hatch Act.

B. OSC Powers. OSC investigators may require evidence from federal employees. All federal employees are required to testify and agencies must provide records to the OSC under Civil Service Rule 5.4. The OSC also has authority to issue

subpoenas for documents or the attendance and testimony of witnesses. During an investigation, the OSC may require employees or other persons to give testimony under oath, to sign written statements or to respond orally to written questions. OSC regulations are published at 5 C.F.R. part 1250, et seq.

C. Deference to Agency. While the OSC is statutorily authorized to investigate allegations of age, race or sex discrimination, procedures and facilities for investigating such complaints have already been established in the agencies and the Equal Employment Opportunity Commission. To avoid duplicating these procedures, the OSC normally defers a complaint involving discrimination to those agencies' procedures rather than initiate an independent investigation.

D. Stays. An employee may request the OSC to seek to postpone or "stay" an adverse personnel action pending investigation by the OSC. If the OSC has reasonable grounds to believe that the proposed action is the result of a prohibited personnel practice he or she may ask the Merit Systems Protection Board (MSPB) to delay the action until an investigation can be completed.

6437 HATCH ACT

A. Prohibitions. The Hatch Act prohibits federal employees from participating in certain political activities. Specifically, it prohibits the use of official authority or influence to interfere with or affect the result of an election. It also prohibits taking an active part in political management or partisan campaigns. The law does not restrict an employee's right to vote in any election, or to publicly or privately express opinions, participate in nonpartisan activities, or petition Congress. State and local government employees who work in connection with federal funds are also subject to some restrictions on political activity.

B. Complaints. Anyone who believes that a violation of the Hatch Act has occurred may file a complaint with the OSC which will investigate and, if warranted, prosecute the offender for breaking the law. The OSC will also give advisory opinions as to whether or not any specific political activity an employee wishes to undertake violates the law.

6438 **AFTER AN OSC INVESTIGATION.** Following investigation of an alleged prohibited personnel practice, the OSC may recommend that an agency take corrective action if there is reason to believe that a prohibited personnel practice has occurred, exists or is to be taken. If the agency does not take the recommended action after a reasonable period, the OSC may request the MSPB to order corrective action. The OSC may also request the MSPB to order disciplinary action against an employee who commits a prohibited personnel practice or who violates civil service laws, rules and regulations. The charged employee's rights in such cases are set forth in the MSPB regulations. A complaint may be filed against an employee for knowing

and willful refusal or failure to comply with a MSPB order. Evidence of a criminal violation uncovered during any investigation is normally referred to DoN.

6439 **EMPLOYEE CONTACT WITH OSC** Most employee problems involving labor relations are resolved within the agency either through an informal discussion with a supervisor or through established grievance procedures. Certain matters, such as adverse personnel actions, may also be resolved through the appeals procedure where an appeal right is granted by law or regulation. Employees should be encouraged to use these channels regardless of whether they also complain to the OSC. Labor relations problems do not fall within the jurisdiction of the OSC unless prohibited personnel practices are involved.

A. Policy. SECNAVINST 12200.2 prescribes procedures and assigns responsibilities for contact with OSC. The instruction provides that "the DoN will comply with the merit system principles, cooperate fully with the OSC's investigations of prohibited personnel practices, and conduct internal investigations of alleged illegal or improper conduct referred to DoN by the OSC." The General Counsel normally acts on behalf of SECNAV in these matters, including obtaining a suitable investigation of any allegations referred to DoN for investigation.

B. Representation. Upon request, the General Counsel ensures that DoN legal counsel is assigned, or outside legal counsel is engaged to represent a DoN employee suspected or accused by the OSC of committing a prohibited personnel practice or illegal or improper act when the act complained of was within the scope of the employee's official responsibilities and such representation is considered to be in the interests of DoN. The General Counsel coordinates the assignment or use of judge advocates as employee representatives with the JAG or the SJA to CMC, as appropriate.

C. Liaison. The Assistant General Counsel (Civilian Personnel) acts as Senior Management Official in OSC matters and arranges the appointment of a liaison officer to serve as point-of-contact for any OSC investigator investigation of an employee at a DoN facility, base, or installation. Whenever the OSC is investigating allegations of improper or illegal conduct by a military member, the Assistant General Counsel coordinates the appointment of a judge advocate as liaison officer. Thus, in any OSC matter, judge advocates might be required to act as liaison officer to the investigation; represent an individual suspected or accused employee, or simply to provide legal advice to an affected command.

6440 **THE WHISTLEBLOWER PROTECTION ACT OF 1989 (WPA).** The Whistleblower Protection Act of 1989 (Pub. L. 101-12) became effective 9 July 1989. Congress has made a conscious attempt to improve the position of a whistleblowers. The WPA provides for a new individual cause of action for reprisals, and substantially revised the legal framework, the means for obtaining third party review of reprisal actions, and the burden of proof requirements. The

WPA also created new statutory entitlements for whistleblowers who prevail in their appeals or complaints.

6441 NEW LEGAL FRAMEWORK.

A. Nature of Allegations. Allegations by employees that the agency made reprisals against the employee for engaging in protected activity are actually allegations of violations of 5 U.S.C. § 2302(b)(8) or 2302(b)(9). The former addresses prohibitions against reprisal in response to an employee who "blows the whistle." The latter addresses prohibitions against reprisal in response to an employee who exercises any appeal right provided for by law, rule, or regulation.

B. Expanded Prohibited Practices. The WPA expands prohibited actions by employers in reference to an employee's engagement in whistleblowing by adding to § 2302(b)(8): threaten to take or fail to take a personnel action. The same change was made in (b)(9). In both § 2302(b)(8) and (b)(9), the phrase "in reprisal for" was changed to "because of", thus obviating the complainant's having to show the agency's intent to reprimand. Additionally, Congress expanded the list of actions for which reprisal is prohibited, adding: testifying for or assisting an employee in the exercise of an appeal right, disclosing information to the Inspector General (IG) or the Office of Special Counsel (OSC), and refusing to obey an order that would require an employee to break the law.

6442 OBTAINING THIRD PARTY REVIEW OF REPRISAL ALLEGATIONS

A. Former Avenues. Historically, in cases decided by the Merit Systems Protection Board (MSPB) and the court, allegations of reprisal were raised through two major avenues:

1. Petition by the Special Counsel for appropriate corrective or disciplinary action when OSC determined, pursuant to an employee complaint, that reasonable grounds existed for believing that an agency committed a prohibited personnel practice in the form of reprisal; and

2. as an affirmative defense in an otherwise appealable action under 5 U.S.C. § 7701(c)(2)(B).

B. Revised Means. Employees alleging reprisal for whistleblowing continue to have the right to complain to the OSC, but the manner in which their complaints are treated from that point forward has changed significantly under the WPA. The law governing how the OSC processes petitions from employees alleging reprisal for whistleblowing activities is very detailed and is outlined in 5 U.S.C. §§ 1213-1220. Under the WPA, an employee alleging reprisal for whistleblowing is now

authorized, in some circumstances, to appeal to MSPB, when the action being challenged is not "otherwise appealable." That is, under the Act employees can:

1. Take their complaints to the MSPB for an independent review within 60 days after the OSC closes an investigation; or
2. Take their complaints to the MSPB for an independent review after 120 days of making a complaint to OSC if the employee has not received notice that the OSC has terminated its investigation; or
3. Continue to raise the affirmative defense of reprisal before MSPB in conjunction with an "otherwise appealable action."

6443 REVISIONS IN BURDEN OF PROOF REQUIREMENTS.

The WPA has changed the burden of proof requirements for cases involving allegations of reprisal for whistleblowing. Historically, these cases have been adjudicated within a framework of shifting burdens of proof.

A. Agency's Burden. Under the WPA, in cases appealed to the MSPB as a result of an agency-initiated action, it appears the agency will continue to have the initial burden of defending its action before the MSPB on the merits. If an agency meets its initial burden of proof on the merits of the case (that is, shows by a preponderance or substantial evidence the existence of misconduct, poor performance, etc.), the burden of proof will then shift to the appellant to show reprisal.

B. Employee's Burden. Previously, to meet his initial burden, an appellant was required to prove by a preponderance of evidence that reprisal was a significant motivating factor in the agency's action. Under the WPA, an appellant will only be required to prove by a preponderance of evidence that reprisal was a "contributing" factor. If an appellant meets his burden of proof, it appears the burden will then shift back to the agency to show that the action would have been taken even if the appellant had not engaged in protected activity. Formerly, agencies were required to prove by a preponderance of the evidence that the action would have been taken even absent the protected activity. This standard has been raised to clear and convincing evidence.

C. Unanswered Questions. The legislative history of the Act is replete with congressional intent to lower the burden required by a whistleblower to prove reprisal. Still, given the significant adjustments to previously accepted standards, future case law will have to determine the real impact of these statutory changes and their practical application.

6444 **ENTITLEMENTS FOR PREVAILING WHISTLEBLOWERS.** The Whistleblower Protection Act of 1989 created new rights for employees who prevail in reprisal cases.

A. Retirement Reinstatement Option A whistleblower complainant may retire and still appeal to the Merit System Protection Board (MSPB), even if the effective date of the optional retirement action is before the effective date of a pending adverse action. If successful in his MSPB appeal the individual can opt to cancel his retirement and be reinstated. If an individual who has retired is subsequently reinstated pursuant to an MSPB or a court decision, the Back Pay Act provides adjustments shall be made to ensure that the individual is treated as if the "unjustified personnel action" had never occurred.

B. Transfer Preference. Employees who prevail in whistleblower cases will be entitled to preference in transfer requests, both within their own agency or another agency, if the employee is otherwise qualified for the job and eligible for the appointment. If the employee is denied such a request, he or she is entitled to appeal the denial to the head of the denying agency and must be given a written explanation by the head of the agency. The employee is entitled to only one such transfer, and the transfer must take place within 18 months of a determination that the employee was a victim of reprisal.

C. Interim Relief. Employees who prevail in an initial decision must be granted the relief outlined in the decision pending the outcome of any petition for review unless:

1. The (MSPB) deciding official determines it is not appropriate to grant the relief; or
2. the relief granted in the decision calls for the appellant to come back to work pending the outcome of a petition for review and the employing agency determines that the appellant's return to the workplace would be unduly disruptive.

D. Back Pay and Attorney's Fees. Once officially reinstated, the employee is entitled to pay and benefits even if not permitted to return to duty. No back pay or attorney fees, however, will be awarded before a final decision is rendered. If a final decision is rendered in favor of the employee, the agency will be liable for attorney fees and other cost incurred if the basis of the decision was a finding of reprisal.

6445 **CONCLUSION.** The new rights and changed burden of proof provided by the Whistleblower Protection Act of 1989 creates an almost "super status" for whistleblowers vis-a-vis other constitutionally protected classes. Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989)(Requiring only proof by preponderance

that a personnel action would have been taken anyway, despite evidence of gender discrimination). Ultimately, the government faces an almost impossible task to meet its newly required burden of proof to justify a personnel action. While it has been suggested that a stringent view of the new definition of whistleblower may provide a basis to limit the scope of alleged whistleblowers able to avail themselves of this law's protection, no reported judicial rulings have yet been made. Only time and litigation will be able to measure the full impact of the new protective provisions of this law.

CHAPTER 65

CLAIMS

6501 **CLAIMS OVERVIEW** Claims involving the United States government and its military activities are governed by a complex system of statutes, regulations, and procedures. This chapter provides a basic reference outline of the claims the SJA is most likely to encounter. The Foreign Claims Act (FCA) is discussed in Part IV of this Deskbook dealing with overseas issues. This chapter is a starting point for research; this discussion is not offered as a substitute for the detailed guidance in chapter VIII of the JAG Manual and JAGINST 5890.1.

6502 **FEDERAL TORT CLAIMS ACT (FTCA)**

A. **References**

1. 28 U.S.C. §§ 1346(b), 2671-2672, 2674-2680
2. JAGINST 5890.1, enclosure (1)

B. **Overview.** The government's liability under FTCA is limited to money damages for injury, death, or property damage caused by the negligent or wrongful act or omission of government employees acting within the scope of their employment. FTCA applies only to claims arising in the United States, or in its territories or possessions.

C. **Scope of liability.**

1. **Negligent Conduct.** "Negligence" is the failure to exercise the degree of care, skill, or diligence that a reasonable person would exercise under the same circumstances. Whether certain conduct was negligent will be determined by local tort law. Claims based on a theory of liability other than negligence, e.g., implied warranty or strict liability, do not lie under the FTCA.

2. **Intentional Torts.** The FTCA will compensate for the following intentional torts but only when committed by federal law enforcement officers: assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution. Since Article 7, UCMJ, extends the authority to apprehend to commissioned officers and petty officers, these officers would be considered law

enforcement officers for FTCA purposes when they are engaged in law enforcement duties. No other intentional tort claims are payable under FTCA.

3. Government Employees. Under the FTCA, the government is liable only for the wrongful acts of its employees. In addition to military and civilian DoN employees, the term 'government employee' includes persons acting on behalf of a federal agency in an official capacity, either temporarily or permanently, and either with or without compensation. Consequently, a government contractor may be considered a government employee under the FTCA when the government exercises a high degree of control over the details of the contractor's activities, e.g., where the contract requires the contractor to follow extensive, detailed instructions in performing the work. Similarly, a nonappropriated fund instrumentality (NAFI) may be government employees under FTCA if the NAFI is charged with an essential function of the federal government; and the degree of control and supervision by the government is more than casual or perfunctory.

4. Scope of Employment. The government is liable under the FTCA only when the employees are acting within the scope of their employment. While scope-of-employment rules vary from state to state, the issue usually turns on the following factors: The degree of control the government exercises over the employee's activities on the job; and the degree to which the government's interests were being served by the employee at the time of the incident.

D. Exclusions from Liability

1. Exempted Governmental Activities. The FTCA does not apply to any claim based on an act or omission of a Federal employee who exercises due care: while in the performance of a duty or function required by statute or regulation; or while performing any discretionary governmental function. The FTCA does not apply to any postal claims or claims relating to detention of goods in connection with law enforcement or customs.

FTCA will not pay claims arising out of combat activities involving direct engagement with the enemy during time of war, declared or not. Claims arising in a foreign country are not cognizable under the FTCA, but may be allowed under either the Military Claims Act or the Foreign Claims Act.

2. Claims Cognizable under other Statutes. Certain claims cannot be paid under the FTCA because they are cognizable under some other claims statute. Although the claimant may still recover under another statute, the amount be significantly less than under the FTCA. Also, the claimant may not have the right under the other claims statute to sue the government if the claim is denied. Examples of claims cognizable under other statutes include: PCA; FECA; Admiralty;

and (for NAFL employees) the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901.

3. Excluded Claimants. Under Feres v. United States, 340 U.S. 135 (1950), the military personnel cannot sue the federal government for personal injury or death occurring incident to military service. Civilian Federal employees usually cannot recover under the FTCA for injuries or death that occur on the job because of Federal Employee Compensation Act (FECA) coverage.

E. Procedures. Claims must be presented in writing within 2 years of accrual. The cognizant NLSO can settle claims up to \$20,000 and deny up to \$40,000. Claims above those limits are resolved at OJAG. DoJ approval is needed to pay claims above \$25,000. If the claim is denied, claimant must file suit or seek reconsideration within 6 months of denial. Venue lies in the judicial district where plaintiff resides, or where act or omission complained of occurred. Plaintiff is not entitled to a jury trial.

6503 **MILITARY CLAIMS ACT (MCA)**

A. **References**

1. Military Claims Act, 10 U.S.C. § 2733
2. JAGINST 5890.1, enclosure (2)

B. Overview. The MCA compensates for personal injury, death, or property damage caused by: the negligence of DoN personnel acting within the scope of their employment; or noncombat activities of a peculiarly military nature. The first theory is similar to the FTCA except that the MCA applies worldwide and affords no statutory rights. The latter theory covers activities which have little parallel in civilian society or involve incidents for which the government has traditionally assumed liability. Under this second theory of MCA liability neither negligence nor scope of employment issues apply.

C. **Exclusions from liability**

1. Exempted governmental activities. A claim will not be payable under the MCA if based on an exempted governmental activity, e.g.: combat action; certain postal activities; property damage claims based on alleged contract violations by the government; and other claims identified in paragraph 4 of enclosure (2) of JAGINST 5890.1.

2. Covered by other Statutes. Claims are not cognizable under MCA if they are payable under any of the following claims statutes: FTCA; PMA; FCA; FECA; or Admiralty.

3. Excluded Classes of Claimants. DoN personnel may recover under the MCA but only for property damage not covered by another claims statute, not for personal injury or death occurring incident to service or employment. Nationals of an ally of a country at war with the United States, unless the individual claimant is determined to be friendly to the United States, are excluded from MCA coverage. Federal agencies and departments are not proper claimants.

4. Negligent claimants. An MCA claim for injury, death, or property damage caused in whole or in part by the claimant's own negligence or wrongful acts can be paid but only to the extent such recovery would be allowed under local law. Recovery would be barred in a contributory negligence jurisdiction and reduced in jurisdiction which followed the comparative negligence doctrine.

D. Procedures. Claims must be presented within 2 years of accrual. Overseas commands with a judge advocate attached may settle or deny claims up to \$5,000. OICs of NLSO Detachments may settle or deny claims up to \$10,000. COs of NLSOs may settle or deny claims up to \$15,000. Claims which exceed those amounts must be forwarded to OJAG. Advance payments may be made. An appeal may be taken to the next higher settlement authority within 30 days of disapproval; no hearing is authorized. If the appeal is denied, the claimant has no right to sue.

6504 ADMIRALTY CLAIMS

A. References.

1. JAG Manual, Chapter XII
2. Suits in Admiralty Act, 46 U.S.C. App. §§ 741-752
3. Public Vessels Act, 46 U.S.C. App. §§ 781-790
4. Admiralty Jurisdiction Extension Act, 46 U.S.C. App. § 740

B. Overview. Admiralty law involves liability arising out of maritime incidents such as collisions, groundings, and spills. Admiralty claims may be asserted either against, or in favor of, the Federal government. The Navy's admiralty claims usually are handled by attorneys in the Admiralty Division of the Office of the Judge Advocate General. When admiralty claims result in litigation, attorneys with

the Department of Justice, in cooperation with the Admiralty Division, represent the Navy in court. Thus, while the command has little involvement in the adjudication or litigation of admiralty claims, it often has critical investigative responsibilities.

B. Scope of liability. The government has assumed extensive liability for personal injuries, death, and property damage caused by naval vessels or incident to naval maritime activities. Examples of the specific types of losses that give rise to admiralty claims include: collisions; wave wash and swell damage; damage to commercial fishing equipment, boats, or vessels; damage resulting from oil spills, paint spray, or blowing tubes; damages or injuries to third parties resulting from a fire or explosion aboard a naval vessel; damage to commercial cargo carried in a Navy bottom; damage caused by improperly lighted, marked, or placed buoys or navigational aids for which the Navy is responsible; and personal injury or death of civilians not employed by the Federal government (e.g., longshoremen, harbor workers, and passengers).

C. Exclusions from liability. Military personnel cannot recover for personal injury, death, or property damage resulting from the negligent operation of naval vessels, except when they are injured or killed while aboard a privately owned vessel that collides with a naval vessel. Civil Service employees and seamen aboard Military Sealift Command vessels are limited to compensation under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8150, for personal injury or death.

D. Procedures. The procedures for investigating and adjudicating admiralty claims are explained in sections 1204-1216 of the JAGMAN.

1. Immediate preliminary report. The most critical command responsibility in admiralty cases is to IMMEDIATELY notify the Judge Advocate General and an appropriate local judge advocate of ANY maritime incident which MIGHT result in an admiralty claim for, or against, the government. Call AV 221-9744 or COMM (202) 325-9744. In the alternative, make NAVY JAG ALEXANDRIA CA/31// an info addressee on message reports required by other directives. The initial report should include all information and detail available at that stage, e.g.: date, time, and place of the incident; a brief description of the incident and resulting injury or damage; and identification of the vessels and parties involved.

2. Subsequent investigative report. After initially notifying the Judge Advocate General, the command must promptly begin an investigation of the incident. A JAG Manual investigation will usually be required, although in some circumstances a letter report will be appropriate. Section 1205 of the JAG Manual provides guidance for determining whether an investigation is necessary. Chapter II of the JAG Manual provides specific investigatory requirements for certain maritime incidents. Also, sections 1207 through 1210 of the JAG Manual prescribe

requirements and procedures concerning witnesses and documents in administrative investigations.

6505 NONSCOPE CLAIMS

A. References

1. 10 U.S.C. § 2737
2. JAGINST 5890.1, enclosure 4

B. Overview. The Nonscope Claims Act (NCA) covers claims for death, injury, damage to or loss of property caused by military personnel or civilian employees incident to: the use of a government vehicle anywhere; OR the use of any other U.S. property on a government installation. Claims can not be paid under NCA if they are cognizable under any other provision of law. The NCA applies worldwide.

C. Scope of liability

1. The personal injury, death, or property damage must be caused by a servicemember or civilian employee of the armed forces or Coast Guard. Acts by employees of nonappropriated fund activities are not covered. Negligence is not required. The scope of employment concept does not apply to nonscope claims.

2. Recovery is barred if the loss was caused, in whole or in part, by the claimant's negligence or wrongful acts or by negligence or wrongful acts by the claimant's agent or employee. Subrogees and insurers may not recover subrogated nonscope claims.

3. The claim must be presented within two years of accrual. Recovery is limited to a maximum of \$1,000 or the actual cost of treatment or burial, whichever is less. If the injured party presents a claim under another statute or regulation but is denied recovery, the claims adjudicating authority will determine if recovery is permissible under the NCA. If an NCA claim is denied, the claimant does not have a right to sue.

6506 ARTICLE 139, UCMJ, CLAIMS

A. Overview. Article 139, UCMJ, provides a mechanism for victim compensation for private property damage or loss caused by riotous, willful, or wanton acts of, or the wrongful taking of property by, a member of the naval service. Article 139 applies only in the United States; overseas, use the Foreign Claims Act.

Article 139 claims are unique in that they provide for the checkage of the military pay of the members responsible for the damage. Although the individual member, not the government, is liable for the damage, the member's command has significant procedural responsibilities which can be found in Chapter IV of the JAG Manual.

B. Scope of Liability for Property Damage

1. Willful damage The property damage, loss, or destruction must be caused by acts of military members which involve riotous or willful conduct, or demonstrate such a reckless and wanton disregard for the property rights of other persons that willful damage or destruction is implied. Only damage that is directly caused by the conduct will be compensated.

2. Wrongful taking Claims for property that was taken through larceny, forgery, embezzlement, misappropriation, fraud, or similar theft offenses will normally be payable. Loss of property that involve a dispute over the terms of a contract, or over ownership of property are NOT normally payable unless the dispute is merely a cover for an intent to steal.

C. Exclusions from liability The following types of claims are not payable under Article 139:

1. Claims resulting from conduct that involves only simple negligence;
2. subrogated claims (e.g., insurers);
3. claims cognizable under other claims statutes or regulations;
4. claims for personal injury or death;
5. claims arising from conduct occurring within the scope of employment;
6. claims for reimbursement for damage, loss, or destruction of government property.
7. claims arising from contractual or fiduciary relationships; and
8. claims for indirect or consequential damages, including interest and attorney fees.

D. Procedures

1. Presentment. Article 139 claims can be made by any property owner, military or civilian, business or charitable, governmental or private. The claimant may make an oral claim but it must be reduced to a personally signed writing that sets forth the specific amount of the claim, the facts and circumstances surrounding the claim and any other matters that will assist in the investigation. If a single incident generates multiple claimants, each must submit a separate claim. The claim must be submitted within 90 days of the incident.

2. Investigation. Claims cognizable under Article 139 may be investigated by an investigation not requiring a hearing. There is no requirement that the alleged offender be designated as a party to the investigation and afforded the rights of a party. The investigation inquires into the circumstances surrounding the claim, gathering all relevant information about the claim. The standard of proof is a preponderance of the evidence.

3. Measure of Damages. The amount of recovery is limited to only the direct physical damage caused by the servicemember. Using a comparative liability theory, the assessment against the member will be reduced by the amount of property damage or loss of property that was proximately caused by the acts or omissions of the property owner, his lessee, or agent. Recovery is limited to the lesser of the repair cost or the depreciated replacement cost for the same or similar item, using the Military Allowance List-Depreciation Guide.

4. Charge Against Pay. The investigation shall make recommendations about the amount to be assessed against the responsible parties. The maximum amount that may be approved by a general court-martial convening authority (GCMA) under Article 139 is \$5000 per offender, per incident. Where there is a valid claim for over \$5000, the claim, investigation into the claim and the commanding officer's recommendation shall be forwarded to JAG or CMC (JAR), before checkage against the offender can begin. The amount that can be charged against an offender in any single month can not exceed one-half of base pay.

5. Offenders Attached to the Same Command. If all offenders are attached to the command convening the investigation, the commander shall ensure that the offenders have an opportunity to see the investigative report and be advised that they have 20 days in which to submit a statement or additional information. If the member declines to submit further information, he shall state so in writing during the 20 day period. The commander reviews the investigation and determines whether the claim is in proper form, conforms to Article 139, and whether the facts indicate responsibility for the damage by members of the command. If the commander finds that the claim is payable, he shall fix the amount to be assessed against the offenders. The commander's action on the investigation is then forwarded to the GCMA for review and action on the claim. The GCMA will notify the

commanding officer of his determinations and the commanding officer will implement that action.

6. Offenders are Members of Different Commands. If the offenders are members of different commands, the investigation will be forwarded to the GCMA over the commands to which the alleged offenders are assigned. The GCMA will ensure that the alleged offenders are shown the investigative report and are permitted to comment on it before action is taken on the claim. If the GCMA determines that the claim is payable he will fix the amount to be assessed against the offenders and direct their commanding officers to take action accordingly.

7. Reconsideration. The GCMA may, upon request by either the claimant or the member assessed for the damage, reopen the investigation or take other action required in the interest of justice. If the GCMA anticipates acting favorably on the request he will give all interested parties notice and an opportunity to respond.

8. Appeal. If the claim is for \$5000.00 or less, the claimant or the member against whom pecuniary responsibility has been assessed may appeal the decision to the GCMA within 5 days of receipt of the GCMA's decision. The GCMA may extend the appeal time for good cause. The appeal is submitted via the GCMA to the Judge Advocate General for review and final action. Action on the GCMA's decision will be held in abeyance pending JAG action.

E. Relationship to court-martial proceedings. Article 139 claims procedures are entirely independent of any court-martial or nonjudicial punishment proceedings based on the same incident. The investigation will not be delayed merely because criminal charges are pending. Court-martial findings may be considered by an Article 139 investigation but are not dispositive given the different issues involved. The Article 139 investigation is required to make its own independent findings.

6507 MILITARY PERSONNEL AND CIVILIAN EMPLOYEES' CLAIMS ACT (PCA)

A. References.

1. Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721 [Personnel Claims Act (PCA)]
2. JAGINST 5890.1, enclosure (5)

B. Overview. The PCA provides relief to both military and civilian employees for personal property damage or loss incurred incident to service. The PCA applies worldwide. Generally, the maximum recovery is \$40,000. Claims must be presented within 2 years of accrual.

C. Scope of Liability. To be payable under the PCA, the claimant's loss must have occurred incident to military service or employment under one of the following general categories of losses incident to service exist. The rules governing each of these areas can be complex. The SJA must refer to JAGINST 5890, determine whether a particular personnel claim is contemplated by one of the categories.

1. Property losses in quarters or other authorized places designated by superior authority for storage of the claimant's personal property;
2. transportation losses, e.g., PCS shipments;
3. losses caused by marine or aircraft disasters;
4. losses incident to combat or other enemy action;
5. property damaged by being subjected to extraordinary risks;
6. property used for the benefit of the government;
7. losses caused by the negligence of a Federal employee acting within the scope of employment;
8. money deposited with authorized personnel for safekeeping or other authorized disposition;
9. certain noncollision damage to motor vehicles, e.g., vandalism, Acts of God, (limited to \$2,000, not including the contents of the vehicle) and PCS shipments;
10. damage to house trailers and contents while on Federal property or shipped under Government contract;
11. certain thefts aboard military installations from the possession of the claimant; and

12. any loss or damage which is not specifically designated as payable but deemed meritorious and payable as a PCA claim by the Judge Advocate General

D. The "reasonable, useful, or proper" test. Not only must the property damage or loss occur incident to service, the claimant's possession and use of the damaged property must have been reasonable, useful, or proper under the circumstances. While the PCA provides broad protection for the military member's personal property, the government has not undertaken to insure all property against any risk. Whether the possession or use of the property was reasonable, useful, or proper is largely a matter of judgment by the adjudicating authority. Factors that are considered include the claimant's living conditions; reasons for possessing or using the property; efforts to safeguard the property; and the foreseeability of the loss or damage that occurred.

E. Excluded Circumstances of Loss.

1. Claimant Negligence. If the property damage was caused, either in whole or in part, by the claimant's negligence or wrongful acts, the personnel claim will be denied. Contributory negligence is a complete bar to recovery.

2. Collision Damage. Damage to motor vehicles is not payable as a personnel claim when it was caused by collision with another motor vehicle. Collision claims may be payable under other claims statutes, e.g., FTCA, MCA, depending on the circumstances. Damage to rental cars on military orders is governed by the Joint Federal Travel Regulations.

F. Excluded Types of Property. JAGINST 5890.1 limits or prohibits recovery for certain types of property damage, including:

1. Currency or jewelry shipped or stored in baggage;
2. losses in unassigned quarters in the United States;
3. Enemy property or war trophies;
4. unserviceable or worn-out property;
5. articles acquired for others, i.e., not members of the claimant's household;
6. inconvenience or loss of use expenses;

7. items of speculative value;
8. business property and real property;
9. sales tax;
10. refundable estimates and appraisal fees;
11. quantities of property not reasonable or useful under the circumstances;
12. articles being worn except under certain limited circumstances;
13. intangible property representing ownership or interest in other property, such as bank books, checks, stock certificates, and insurance policies;
14. government property; and
15. contraband.

G. Procedures. PCA claims must be presented within 2 years of accrual. For claims in connection with PCS moves, claimants must give notice of within 70 days of delivery; failure to give timely notice bars the later claim. The claimant files DD Forms 1842 and 1844 (e.g., JAGINST 5890.1, App. A-5-1 and -2) with Privacy Act statement, evidence of ownership, estimates, police reports, etc. An investigating officer "investigates" and forwards the claim with a recommendation to adjudicating authority. Among the various personnel identified in JAGINST 5890.1, enclosure (5), NLSO COs may adjudicate and pay PCA claims up to \$40,000. They may delegate authority to pay claims up to \$5,000. Authority to pay PCA claims in the Marine Corps is centralized at HQMC. The computation of the award includes depreciation and various sub-limits based on property classes. Partial payments are authorized; up to one-half of the estimated total may be paid in hardship situations. Dissatisfied claimants may request reconsideration by the next higher adjudicating authority or, in the case of Marine Corps claimants, by OJAG.

6508 FEDERAL CLAIMS COLLECTION ACT (FCCA)

A. References

1. Federal Claims Collection Act, 31 U.S.C. § 3711

2. JAGINST 5890.1, enclosure (6), section A

B. Overview. Under the FCCA, the government may recover compensation for property damage caused by private parties to the same extent as could a private person under local law. The FCCA applies worldwide; claims must be made within 3 years of accrual.

1. Liable Parties. FCCA claims may be pursued against private persons, corporations, associations, and nonfederal governmental entities. An FCCA claim also can be asserted against any Federal employee responsible for the damage and if the responsible party is insured, the claim may be presented to the insurer. Unless aggravating circumstances exist, however, the government does not seek recovery from servicemembers and government employees for damage caused by their simple negligence.

2. Measure of Damages. The amount of the government's recovery for an FCCA claim is determined by the measure-of-damages rules of the law where the damage occurred. There is no maximum limit to recovery.

C. Procedures. Specific procedures and collection policies are promulgated in the JAGINST 5890.1.

1. Authority to handle FCCA claims. JAGINST 5890.1 lists the officers authorized to pursue, collect, compromise, and terminate action on FCCA claims. These include certain officers in OJAG and most NLSO commanding officers. These officers may collect claims in any amount; claims over \$20,000 can be terminated or compromised only with DoJ approval.

2. Repair or replacement in kind. In some cases, the party responsible for the damage, or that party's insurer, may offer to repair or replace the damaged property. The commanding officer of the property may accept repair or replacement if such a settlement is in the government's best interest.

6509 MEDICAL CARE RECOVERY ACT (MCRA)

A. References

1. Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653
2. JAGINST 5890.1, enclosure (6), section B

B. Overview. When the government treats, or pays for the treatment of a military member, retiree, or dependent, the United States may recover the reasonable value of those medical services from any third party legally liable for the injury. The MCRA applies worldwide; claims must be made within 3 years of accrual.

1. Independent cause of action. The MCRA created an independent cause of action for the United States. Its right of recovery is not dependent upon a third party. The tortfeasor's procedural attack or defense against the injured party will not bar recovery by the government; substantive defenses do apply.

2. Determined by local law. The extent of any MCRA recovery by the Federal government is determined by the law where the injury occurred. The Federal government enjoys no greater legal rights or remedies than the injured person would under the same circumstances.

3. Liable parties. MCRA claims may be asserted against private individuals, corporations, associations, insurers, and nonfederal governmental agencies. They also may be asserted against a Federal employee responsible for the injuries, except that no such claim may be asserted against servicemembers injured as a result of their own willful or negligent acts. On a subrogation theory, however, the United States can seek recovery against the member's private medical insurance coverage.

D. Procedures. MCRA procedures are governed by JAGINST 5890.1, Enclosure (6), section B. Notable aspects of MCRA procedures include the following:

1. "JAG designees". Primary responsibility for assertion and collection of MCRA claims rests with "JAG designees" (i.e., officers delegated MCRA responsibilities by the Judge Advocate General). JAG designees include certain officers in OJAG and commanding officers of most NLSOs, who have been assigned geographic areas of responsibility. JAG designees may assert and receive full payment of MCRA claims in any amount, but they may compromise, settle, or waive claims up to \$40,000. Claims in excess of \$40,000 may be compromised, settled, or waived only with DoJ approval.

2. Investigations. When a military member, retiree, or dependent receives federal medical care for injuries or disease for which another party may be legally responsible, an investigation will be conducted if inpatient care exceeds three days or outpatient care exceeds ten visits. The commanding officer of the local naval activity most directly concerned, usually the commanding officer of the personnel involved in the incident or of the activity where the incident took place, is responsible for directing the investigation. A copy of any investigation involving a potential MCRA claim should be forwarded to the cognizant JAG designee.

3. Injured person's responsibilities The government's rights under the MCRA are largely derivative from the injured person's legal rights. If the injured person makes an independent settlement with the liable party, the government's rights could be prejudiced. In addition, if the injured person receives compensation for medical expenses, the government is entitled to recover its MCRA claim from the injured person out of the proceeds of the settlement. To preserve the government's rights, the JAG designee will advise injured members of their obligations under MCRA, including the duty to:

- a. Furnish the JAG designee with any pertinent information concerning the incident;
- b. notify the JAG designee of any settlement offer from the liable party or that party's insurers;
- c. cooperate in the prosecution of the government's claim against the liable party;
- d. give the JAG designee the name and address of any civilian attorney representing the injured party;
- e. refuse to execute a release or settle any claim concerning the injury without the prior approval of the JAG designee; and
- f. refuse to provide any information to the liable party, that party's insurer, or attorney without prior approval of the JAG designee.

PART VII: LEGAL ASSISTANCE

CHAPTER 71

GENERAL TOPICS

7101 **INTRODUCTION.** The sheer breadth of the legal assistance field prevents a detailed analysis here of every topic the SJA might encounter in a given tour. This single Part would be more voluminous than the others combined. Instead, subjects in this Part are presented in more abbreviated form. Where adequate substitutes exist and are likely to be available, the SJA will be pointed in the direction of those resources. No two judge advocates would likely agree on the contents of this Part. Given the length limitations imposed, not all subjects can be addressed. The topics addressed here reflect the subjects that field judge advocates chose to send us. To the extent the relative volume of material on given topics indicates field interest, this Part may be useful. If our inference was incorrect, let us know what we missed and, if possible, send us what raw materials you have on the subject. In addition, policy issues have been intentionally avoided in anticipation of the JAGINST 5801.2 which should be promulgated in early 1992.

7102 **REFERENCES.** There are many references available to legal assistance officers. Since the law on any subject will vary from state to state, it is critical that all legal assistance officers obtain whatever resources are available locally. Available resources include the following items.

- A. Department of the Navy, Office of the Judge Advocate General (Code 36), Legal Assistance Memoranda
- B. Department of the Navy, Office of the Judge Advocate General, Legal Assistance Deskbook
- C. Naval Justice School, Civil Law Study Guide, Chapter 8
- D. JAGINST 5801.1 series, Subj: LEGAL CHECKUP PROGRAM
- E. OPNAVINST 5801.1 series, Subj: LEGAL CHECKUP PROGRAM
- F. Department of the Navy, Office of the Judge Advocate General, Legal Assistance Bulletin
- G. Off The Record, Office of the Judge Advocate General of the Navy

- H. The Judge Advocate General's School, U.S. Army, All States Consumer Law Guide
- I. The Judge Advocate General's School, U.S. Army, All States Will Guide
- J. The Judge Advocate General's School, U.S. Army, All States Marriage and Divorce Guide
- K. Office of the Judge Advocate General, Headquarters USAF, All States Income Tax Guide
- L. American Bar Association, Legal Assistance for Military Personnel (LAMP) Committee, Legal Assistance Newsletter
- M. Special Assistant to the President and Director, U.S. Office of Consumer Affairs, Consumer Resource Handbook
- N. Headquarters, Department of the Army, DA Pam. 27-50, The Army Lawyer
- O. Headquarters, Department of the Army, DA Pam. 27-12, Legal Assistance Handbook
- P. Office of the Judge Advocate General of the Air Force, AFRP 110-2, The Reporter
- Q. Martindale-Hubbell Law Directory: Law Digests, Uniform Acts, A.B.A. Codes
- R. Marine Corps Manual for Legal Administration, MCO P5800.8
- S. The Judge Advocate General's School, U.S. Army, All States Guide to State Notarial Laws
- T. The Judge Advocate General's School, U.S. Army, All States Guide to Garnishment Laws and Procedures
- U. Headquarters, Department of the Army, DA Pam. 27-166, Soldiers' and Sailors' Civil Relief Act
- V. The Judge Advocate General's School, U.S. Army, All States Guide to Garnishment Laws and Procedures

7103 **GENERAL MATTERS.** Chapter 7 of the JAG Manual provides general guidance on administration of the legal assistance program. Chapter 7 provides guidance on questions relating to eligibility, confidentiality of services,

extent of services rendered, limitations on judge advocate representation, prohibited practices, the Expanded Legal Assistance Program (ELAP), and the Preventive Law Program.

7104 **ELIGIBILITY.** Legal assistance is a service intended to benefit active-duty servicemembers. While each legal field command is required to provide legal assistance, the scope of those services has been left to individual command discretion as dictated by the local workload.

A. **General.** The following groups of persons are eligible for legal assistance:

1. Active-duty personnel;
2. dependents of active-duty personnel;
3. military personnel of allied nations serving in the U.S., its territories or possessions;
4. retired military personnel;
5. dependents of retired military personnel;
6. survivors of members of the armed forces who would be eligible were the servicemember alive; and
7. civilians, other than local-hire employees, who are in the employ of, serving with, or accompanying the U.S. forces in overseas areas and their dependents.

B. **ELAP.** Personnel eligible for ELAP (discussed below) include:

1. Active duty personnel in pay grades E-3 or below;
2. married E-4 personnel; and
3. any member that cannot afford the services of a civilian attorney and, therefore, would be forced to go into court without adequate representation.

7105 LIMITATIONS ON SERVICES PROVIDED

A. **Nonlegal advice.** Legal assistance officers should provide legal advice only. Clients should be referred to the appropriate person or agency for counseling on nonlegal issues.

B. Dual Representation. The same lawyer should not represent both parties in a matter, e.g., a domestic relations case. More guidance on this perennial question is expected in the forthcoming JAGINST 5801.2.

C. Proceedings involving the United States. A legal assistance officer may not advise on, assist in, or become involved with, individual interests opposed to, or in conflict with, the interests of the United States without JAG's specific approval.

D. Compensation. Judge advocates on active duty are prohibited from accepting, directly or indirectly, any fee or compensation of any nature for legal services rendered to any person entitled to legal assistance.

E. Telephonic Advice. In the absence of unusual or compelling circumstances, legal advice should not normally be given over the telephone.

7106 **REFERRAL TO CIVILIAN LAWYERS.** There is no required minimum number of lawyers' names that should be given to the client for referral purposes, but care should be taken to avoid the appearance of impropriety in consistently referring cases to an unreasonably small number of attorneys. If possible, refer the client to:

- A. An appropriate bar organization;
- B. a lawyer referral service; or
- C. a legal aid society or other organization.

7107 **EXPANDED LEGAL ASSISTANCE PROGRAM.** R JAG Manual § 0711, the Expanded Legal Assistance Program (ELAP), allows legal assistance officers to represent certain military personnel in civilian court at no expense to the member. ELAP programs are extremely valuable. They give deserving servicemembers free legal representation and participating ELAP attorneys civilian courtroom experience. Questions regarding ELAP should be referred to the Office of the Judge Advocate General Code 36 or call AUTOVON: 221-7928; Commercial: (703) 325-7928.

- A. Scope. The types of cases covered by the ELAP program include:
- 1. Adoptions;
 - 2. name changes;
 - 3. routine or "short form" statutory probates of small estates;

4. divorce, separation, and child-custody matters;
5. paternity;
6. nonsupport and Uniform Reciprocal Enforcement of Support Act cases;
7. collection of security deposits and debts;
8. actions involving conditional-sales contracts or warranties;
9. minor tort cases, in particular where there is a clear claim and an unjustified refusal to pay;
10. defense of disputed indebtedness; and
11. criminal defense in traffic and minor misdemeanor cases.

B. **Authorization.** ELAP may be established only with the prior authorization of the Judge Advocate General and will not be authorized for independent legal assistance attorneys. ELAP services are provided in addition to, rather than in lieu of, a normal legal assistance program, and will be authorized only for those activities willing to commit sufficient personnel to maintain an active legal assistance program as well as the ELAP.

1. Commanders who want to establish an ELAP in their area should submit a written application to the Judge Advocate General, via Commander, Naval Legal Service Command. Include a brief description of the proposed program, the number of attorneys presently assigned to legal assistance (and time devoted to legal assistance if part-time) and those who will be assigned to legal assistance if the ELAP is implemented, the number of attorneys to be assigned to the ELAP (and time to be devoted if part-time) and the number of whom are members of the local bar. Attach a copy of any agreement with the local bar, courts, and licensing authority regarding the ELAP and practice by legal assistance attorneys not admitted to practice in the local courts.

2. Authorizations expire on 1 December of the year following the date of issue unless sooner renewed. Applications must be in writing and contain a report of cases handled since authorization or last renewal and personnel changes which have occurred or are anticipated. Renewal applications should be forwarded, via Commander, Naval Legal Service Command, in time to reach the Judge Advocate General by the 1st of November.

C. **Supervision.** The area supervisor is usually the commanding officer of the NLSO. The area supervisor is responsible for the proper administration of the

program and must ensure compliance with the manual and local ethical standards and rules of court. The area supervisor may limit the scope of practice of ELAP attorneys locally and may direct any ELAP attorney to refrain from handling a case or type of case.

D. Attorney Qualifications. Any legal assistance attorney may participate in the ELAP program; however, court appearances will be made, and actions which constitute an attorney counsel of record in a matter under local law or rules of court will be taken, only by a legal assistance attorney who is licensed to practice law in the State, and admitted to practice in the court in which the matter is pending or to be filed, or by a legal assistance attorney specifically admitted to practice in that court, either generally or for special agreement with the court and licensing authority. Legal assistance attorneys participating in an ELAP are subject to local ethics rules and rules of court in all ELAP matters.

E. Coordination with the Local Bar. ELAP services are not intended to deprive civilian attorneys of sources of income. On the contrary, ELAP seeks to provide needed legal services for eligible personnel who cannot provide a source of income to the civilian bar.

1. No agreement with State authorities is required to operate an ELAP using only legal assistance attorneys licensed to practice and admitted to the courts of that State. A memorandum of understanding with these authorities and local bar associations is, however, recommended.

2. Where legal assistance attorneys not licensed or admitted in the State are to be used in ELAP, special arrangements for their qualification to practice must be made. This may require modification of the State local rules of court, or may be through a special agreement or court order. Normally, arrangements must be made both with State licensing authorities and the courts in which practice is contemplated. Though not required, the local bar association should be included in the process. Take care to avoid committing the United States to open-ended financial arrangements or indemnity agreements which may violate the Anti-Deficiency Act.

F. Fees, Costs, and Client Funds. All fees and costs connected with an ELAP case must be paid by the client. Per a punitive regulation, a legal assistance attorney may not advance any funds, either Government or personal, to any client for any purpose, nor may a legal assistance attorney receive any funds from or for the benefit of a client. Legal assistance offices also may not maintain client trust funds of any kind. An award of the attorney's fees normally will not be sought in an ELAP case. Should attorney's fees be awarded for the actions of a legal assistance attorney, such fees are the property of the United States and must be paid into the U.S. Treasury.

7108 **NOTARIAL ACTS AND OATHS.** Most notarial powers are governed by state law. JAGMAN, Chapter 9 is the main reference in the Navy and Marine Corps for notarial powers

A. Oaths. 10 U.S.C. § 936 authorizes certain military members on active duty to administer oaths for certain Federal purposes. Article 136, UCMJ allows SECNAV by departmental regulations to extend notarial powers to certain other military members for limited purposes. JAG Manual § 0902 lists those members authorized to administer oaths. The oaths are valid only for those situations described in § 0902. For example, a person designated to conduct an investigation is given the authority to administer oaths to any person when it is necessary in the performance of his duties as an investigating officer. An oath administered by the investigating officer, which had no connection with the investigation, would be invalid unless authorized by some other provision of Chapter 9.

B. Acknowledgements. An acknowledgement is a formal declaration to an authorized official that a certain act or deed was the free and knowing act of the defendant. Often used in relation to deeds of real property, the acknowledgement affirms the genuineness of the owner's intent to convey title to property and that the execution of the deed is the free and knowing act of the owner. The purpose of acknowledgments generally is to entitle the instrument to be recorded or to authorize its introduction in evidence without further proof of its execution. Acknowledgements are governed by state laws. JAG Manual § 0906.

C. Sworn Instruments. Sworn instruments are written declarations signed by a person who declared under oath before a properly authorized official that the facts set forth in the document are true to the best of his knowledge and belief. They normally include affidavits, sworn statements, and depositions. The purpose of sworn instruments is to make a formal statement under oath of certain facts which are known to the person making the statement. JAG Manual § 0907.

D. Authority to Perform. JAG Manual § 0902 discusses the authority for performing certain notarial acts for Federal purposes. To varying degrees, all fifty states, the District of Columbia, and the U.S. possessions have granted limited notarial powers to all commissioned officers (O-1 or above) of the armed forces. The statutes are so diverse that it is advisable to consult in every case the alphabetical listing of state statutes contained in JAGMAN, § 0910. Many states have recently passed amendments to their notary laws, so individual state codes should also be consulted. Another excellent reference source is the All States Guide to State Notarial Law published by the Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. Major Charles Jones USMC at NLSO Norfolk is also a respected authority on the subject.

E. Effectiveness of the notarial acts. If the somewhat ritualistic procedure is meticulously followed for each notarial act, the document or oath should be legally effective in the vast majority of cases. A key point to keep in mind, however, is that some states require strict adherence to their particular procedures. Additionally, many states do not accept a military notary in situations involving dependents. Other states will only accept a military notary for a dependent's declaration if the dependent is outside of the United States. An officer attempting to perform a notarial act must first ascertain if the act will be accepted in the state for which it is intended. This is especially important in the case of real estate transactions, a member's or dependent's interests could be seriously jeopardized by their reliance upon an ineffective notarial act.

CHAPTER 72

FAMILY LAW ISSUES

7201 NONSUPPORT

A. References

1. MILPERSMAN 6210120
2. LEGADMINMAN, ch.6
3. USCG: PERSMAN 8-G.

B. Policy. Servicemembers must provide continuous and adequate support per their legal and moral obligations.

1. Spouse. Member must support unless:
 - a. Court order relieves the obligation;
 - b. Spouse relinquishes support in writing;
 - c. Separation agreement between the parties;
 - d. Navy Family Allowance Activity, CMC or CCG, grants waiver to servicemember (limited to cases of desertion, infidelity or physical abuse).
2. Children: Member must support unless:
 - a. Child adopted by another;
 - b. Child attains majority; or
 - c. Divorce decree specifically relieves the member of the obligation (the conduct of the spouse does not relieve the member of this obligation).

C. Amount of Support. The member must provide such support as required by:

1. A court order;
2. Mutual agreement.

[In the absence of either of the above, consider the support guidelines in the MILPERSMAN, LECADMINMAN, or, PERSMAN.]

D. Possible Consequences. Members who fail to honor their just support obligations are subject to: lower evaluations; administrative separation for pattern of misconduct (USCG misconduct or unsuitability; financial irresponsibility; garnishment of pay; Article 134, UCMJ; dishonorable failure to support; withhold or recoup BAQ; lose dependent tax deduction; and involuntary allotment under 42 U.S.C. § 665.

7202

CIVILIAN SUPPORT ENFORCEMENT MECHANISMS

A. Involuntary Allotments

1. Citations
 - a. 42 U.S.C. § 665
 - b. 32 C.F.R. Part 54 (DoD implementing regulations)
 - c. 33 C.F.R. Part 54 (Coast Guard implementing regulations)
2. Basic requirements
 - a. A state court or administrative support order that includes a child support component.
 - b. An arrearage equal to or exceeding the support required for a 2-month period.
3. Procedure
 - a. A state (but not a foreign) child support enforcement agent (or court) sends a letter (or order) to the military finance center stating that the requisite arrearage exists and requesting that a "mandatory allotment" be started.
 - b. The finance center notifies the member's commander and the member concerning the request.

- c. Absent presentation of an adequate and timely defense by the soldier, the allotment is started.
 - (1) The allotment will be for the amount of the member's support obligation, payable per the request, continuing until the requester advises that it should stop.
 - (2) Arrearages can be collected, but there must be a second court order requiring payment of the arrearage by involuntary allotment (a letter from a CSE agent asking for arrearages is insufficient).

4. Limitations

- a. If the member is supporting other family members, the maximum amount of the involuntary allotment is 50% of disposable earnings.
 - (1) "Disposable earnings" is basic pay plus most bonuses and special pay, minus taxes and other deductions.
 - (2) The term also includes BAS for officers and warrant officers, and BAQ for members with dependents and all members in the grade of E-7 and above. See 32 C.F.R. § 54.6(b).
- b. If the member is not supporting other family members, the maximum is 60% of disposable earnings.
- c. An additional 5% is tacked on to the maximum (i.e., the maximum is boosted to 55% or 65%) if "the total amount of the member's support payments is 12 or more weeks in arrears." 32 C.F.R. § 54.6(a)(5)(iii).

5. Strategies for the Member

- a. Show that information in the request is in error. 32 C.F.R. § 54.6(d) (5).
 - (1) Member must submit an affidavit and evidence to support the claim of error.
 - (2) Must provide this information to the finance center within 30 days of their notice.

- b. Negotiate a mutually acceptable resolution with the child support agency or the custodial parent.
- c. Do not start a voluntary allotment upon receiving notification of an involuntary allotment action; the member will simply have two allotments deducted from military pay.

6. Helping the Custodial Parent

- a. The custodial parent must first have a child support order issued by a U.S. court.
- b. Two approaches to getting a mandatory allotment.
 - (1) Ask the applicable CSE agency to submit the request. The "applicable" agency is probably in the state where the order was issued. This approach usually works well if the order calls for payments to be made through the court or agency so they have a record of the arrearage.
 - (2) Or, submit a request directly to the court that issued the order, asking it to request initiation of a mandatory allotment. The court will need a sworn statement from the custodial parent alleging the appropriate arrearage.

B. Garnishments

1. References

- a. 42 U.S.C. §§ 639-662.
- b. 5 C.F.R. Part 581.

2. There is no "federal garnishment law."

- a. The garnishment statute is merely a waiver of federal sovereign immunity, allowing state garnishment orders to be served on federal officials.
- b. The garnishment statute applies to active duty and retired military pay, reserve drill

pay, and current and retired federal civilian employee salaries.

- c. The federal statute currently provides that federal agencies need only comply with garnishment order for child support or alimony obligations.
- d. The garnishment can be for current support, or support arrears, or both, according to state law.
- e. The ceiling on the amount subject to garnishment is the lower of state law or the limits stated in the federal Consumer Credit Protection Act (CCPA) (15 U.S.C. § 1673).
 - (1) CCPA provides for garnishment of a maximum of 50% of disposable earnings if the member is supporting other family members and 60% if he or she is not; an additional 5% can be garnished if the support obligation is more than 12 weeks in arrears.
 - (2) Disposable pay includes basic pay and most bonus and special pay entitlements, but not BAQ or BAS.

3. Defenses for the Member

- a. The finance center will not entertain defenses raised by the member in garnishment actions from U.S. courts.
- b. Disputes must be litigated in the state that issued the garnishment order.
- c. If the member is supporting family members other than those to whom the garnishment order pertains, make sure the finance center knows this since it can affect how much money is deducted from the member's pay.

C. Wage Assignment Orders

- 1. These are "involuntary allotments" created by state law that can be used to enforce support obligations against civilian and military parents.
 - a. The trigger for a wage assignment generally is an arrearage of not more than 30 days.

- (1) Some states currently have automatic wage withholding that takes effect immediately upon issuance of the support order, whether or not there is an arrearage.
 - (2) The Family Support Act of 1988 requires that all states implement automatic wage withholding in phases (based on varying categories of obligees) by 1992.
- b. In cases involving contingent withholding provisions, the absent parent receives notice of intent to initiate a wage assignment, and if no defense is presented, a notice of assignment is sent to the employer.
 - c. All employers must honor wage assignment orders; DoD agencies process them as if they were garnishment orders.

2. Assisting the Absent Parent

- a. Upon receipt of notice to initiate a wage assignment notify the agency of any error in alleged arrearages. Notify the agency of modifications of the underlying support order or other facts which negate the support obligation.
- b. Ensure the finance center knows that the member is supporting other family members.
- c. If a member is paying support by allotment and a decree or support order is pending in a state with automatic wage assignments, stop the allotment several months before the decree will be issued.

3. Assisting Custodial Parents. Refer custodial parents to the nearest state or county child support enforcement office.

D. Uniformed Reciprocal Enforcement of Support Act (URESA)

1. The primary purpose of URESA is the enforcement of an order issued by another court. URESA itself does not create a support obligation; its purpose is to enforce obligations created under other provisions of state law.
2. The custodial parent goes to the court where she resides and files a petition to enforce a support order against the absent parent

who resides in another jurisdiction. The court in the "initiating state" reviews the petition and sends it on to the appropriate court or agency where the absent parent resides (the "responding state").

3. The district attorney or other official in the responding state prosecutes the enforcement action against the absent parent. The custodial parent need not appear but may present evidence through an affidavit or less formal means. The law of the forum court applies. The court issues an order based on the facts presented.
3. The primary purpose of URESA is the enforcement of an order issued by another court. URESA itself does not create a support obligation; its purpose is to enforce obligations created under other provisions of state law.
4. URESA can establish a support order in most jurisdictions and establish paternity in many others.

7203

THE UNIFORM CHILD CUSTODY JURISDICTION ACT

A. Purposes. The UCCJA seeks to:

1. Avoid jurisdictional conflicts and promote cooperation between courts and the states.
2. Assure that child custody litigation takes place in a state where the child and family have the closest contacts.
3. Deter abductions, discourage continuing controversies, avoid re-litigation of prior custody disputes, and provide a stable home environment for the child.
1. All states have adopted the UCCJA, although some have modified the uniform language in places.

B. Key Definitions

1. Custody determination: a court decision and court orders or instructions providing for the custody of a child, including visitation rights, but not including support or other monetary obligations.

2. Home state: the state where the child or children lived with the parents, one parent, or a person acting as a parent for at least six months immediately preceding the date on which the action is commenced, or if the child is less than six months old, the state where the child has lived from time of birth.

C. Basic Jurisdictional Provisions. UCCJA § 3.

1. A court may exercise jurisdiction over a custody proceeding if it has subject matter jurisdiction under state law and if it:
 - a. Is the "home state" at the time the proceeding is commenced; or
 - b. Had been the home within 6 months preceding the commencement of the action, and the child is absent because of "removal or retention by a person claiming custody or for other reasons," and a parent or person acting as parent continues to live in the state.
2. Jurisdiction may be exercised if the court has subject matter jurisdiction and it is in the best interests of the child because:
 - a. The child and his parents, or the child and at least one contestant, have a *significant connection* with the state, and
 - b. There is available in the state substantial evidence regarding the child's present or future care, protection, training, and personal relationships.
3. Jurisdiction may be exercised, assuming the court has subject matter jurisdiction, if the child is physically present in the state; and
 - a. It has been abandoned; or
 - b. Emergency action is necessary to protect the child from actual or threatened mistreatment, abuse, or neglect.
4. A fourth basis for the exercise of jurisdiction exists if it would be in the child's best interests; and
 - a. No other state has jurisdiction under any of the first three grounds; or

- b. Another state has declined jurisdiction on the ground that custody would more appropriately be determined in the state proposing to exercise jurisdiction.
- 5. The role of physical presence of the child.
 - a. The child's physical presence in the state is not by itself a sufficient basis to exercise jurisdiction.
 - b. On the other hand, while the child's physical presence in the state may be desirable, it is not a prerequisite for jurisdiction in a custody proceeding unless the court is using the "emergency" provision.

D. "Teeth" in the UCCJA

- 1. Binding force, res judicata and recognition of out-of-state decrees.
 - a. A custody decree by a court with jurisdiction binds all parties served in the state, served in accordance with the notice provisions of the UCCJA, or who have submitted to the court's jurisdiction, or who had an opportunity to be heard.
 - b. Courts of one state are required to recognize and enforce a decree of another state rendered under the UCCJA or a substantially similar act.
- 2. If the court finds that it is an inconvenient forum, it can require the party bringing the action to pay all costs, including travel expenses of the child and opposing parties.
- 3. The same provision requires all costs and attorneys fees be paid by a party who has wrongfully taken the child or engaged in other reprehensible conduct.
- 4. Appearance of the child and other parties.
 - a. The court may order any person within the state to appear, and if that person has physical custody of the child, to appear with the child.

- b. If a party outside the state desires to appear, the court may require the party requesting the hearing to pay any costs.
- c. A court in one state may request a court in another state to order a party in the second state to appear before the requesting state court, and if the party has custody of the child, to appear with the child.
- d. A court may request a court of another state to hold evidentiary hearings or to have a social services studies made.

E. International Application

- 1. UCCJA § 23. The UCCJA applies internationally, if:
 - a. There was reasonable notice; and
 - b. The jurisdiction has laws substantially similar to the Act; and
 - c. An opportunity to be heard was given to all affected persons.

7204

THE PARENTAL KIDNAPPING PREVENTION ACT

A. Impetus for the PKPA. 28 U.S.C. § 1738A.

- 1. Congressional dissatisfaction over increasing numbers of parental kidnappings, inconsistent and conflicting court orders, excessive relitigation.
- 2. Lack of criminal enforcement mechanism in UCCJA.
- 3. Desire to track down runaway parents.

B. Jurisdictional Aspects of PKPA

- 1. Full faith and credit must be given to valid sister state child custody determinations.
- 2. Such determinations are valid as long as the rendering state had jurisdiction pursuant to one of the jurisdictional bases found in the PKPA.

- a. "Home state" on the date of commencement of the proceeding; or had been the home state within 6 months of the commencement, and child has been removed by a contestant, and a contestant continues to reside in the state.
 - b. If no state qualifies as a home state, jurisdiction can be exercised if: the child and at least one contestant have a significant connection with the state other than mere physical presence; and there is available in the state substantial evidence concerning the child's present and future care, protection, training, and personal relationships.
 - c. The child is physically present in the state and is abandoned or an emergency situation exists.
 - d. If no state has jurisdiction on the preceding grounds, or all states with potential jurisdiction have declined to exercise it, and the exercise of jurisdiction is in the best interests of the child.
3. Conflicts between the UCCJA and the PKPA are resolved in favor of the latter.
 4. A court in one state is entitled to modify a custody award by a court of another state if:
 - a. It has jurisdiction; and
 - b. The court in the other state no longer has jurisdiction or has declined to exercise jurisdiction to make a modification. The statute provides that the state with original jurisdiction continues as long as the child or one parent remains in the state.
 - c. A court cannot exercise jurisdiction if there is already another custody action pending in another state and that state is exercising jurisdiction consistent with the PKPA.

- C. PKPA's Enforcement Mechanism. Parental kidnapping is an act for which a warrant for unlawful flight to avoid prosecution may be issued under 18 U.S.C. § 10t3 if:

1. There is evidence that the child was taken across interstate or international borders; and
2. The state from which the child was taken has a statute which makes such taking a felony.

7205 PATERNITY COMPLAINTS

A. References

1. MILPERSMAN 6210125
2. LEGADMINMAN, chapter 8
3. PERSMAN 8-G-5

B. Policy. Members owe the same duty of support to children born out of wedlock. Paternity is established by: court decree or member's admission.

C. Processing. Refer the complaint to the member. If a court order exists, the member must pay. Similarly, the member must pay if he admits paternity. If the member denies paternity, the command advises the complainant of the results of the interview.

7206 FORMER SPOUSES' PROTECTION ACT

- A. 10 U.S.C. § 1408 (1982 and Supp. II, 1984)
10 U.S.C. § 1072 (1982 and Supp. II, 1984)
- B. The Act legislatively overruled McCarty v. McCarty, 453 U.S. 210 (1981)
- C. Main provisions
 1. State courts may treat military retirement pay as property of the member and his spouse according to State law.
 2. To prevent "forum shopping," a court purporting to divide such retirement pay must have jurisdiction over servicemember by:
 - a. Residence, other than presence in jurisdiction due to military orders;
 - b. Consent; or
 - c. Domicile in the jurisdiction.

3. If the marriage lasted ten years or more (overlapping 10 years' service), payment of the spouse's portion of pension can come directly from the military finance center (finance center will also pay any alimony and child support specified in the same judgment or court order).
4. An unremarried former spouse may also qualify for exchange, theater, commissary, and medical benefits depending on the duration of marriage/length of service/years of overlap between the two.
 - a. 20/20/20 (20 year marriage/20 years' military service/ 20 years' overlap of marriage and service) - Entitled to: exchange; commissary; theater; legal; military medical (unless already covered by employer).
 - b. 20/20/15 (20 year marriage/20 years' service/15 year overlap) and
 - (1) Divorced before 1 April 1985 - entitled only to military medical (unless already covered by employer)
 - (2) Divorced after 1 April 1985 - entitled to military medical benefits (unless employer covers) until (at most) two years from date of divorce; spouse may then "convert" to private coverage.
 - c. These benefits terminate upon remarriage; benefits may be restored upon remarriage to the same person.

7207

SURVIVOR BENEFIT PLAN (SBP)

A. References. The Survivor Benefit Plan was enacted by Pub. L. No. 92-425 on 21 September 1972, codified at 10 U.S.C. §§ 1447-1455, and replaces two former plans -- the Retired Serviceman's Family Protection Plan and the U.S. Contingency Option Act. The SBP provides all members of the uniformed services who are entitled to retired pay with the opportunity, in the event of their death, to provide up to 55% of their gross retired pay as an annuity payable to their designated beneficiaries. The primary references are NAVMILPERSCOMINST 1750.2 series, Subj: Survivor Benefits, including the Retired Servicemembers Family Protection Plan (RSFPP) (10 U.S.C. §§ 1431 et seq.) and the Survivor Benefit Plan (SBP) (10 U.S.C. §§ 1447 et seq.) as amended; and NAVEDTRA 4660D, Subj: Survivor Benefit Plan for the Uniformed Services, (stock number 0503-LP-003-0290).

B. Automatic enrollment. Unless a retiree elects not to participate in SBP, or elects to participate at less than the maximum level (full gross retired pay) before the first day on which he or she becomes entitled to retired pay, each member with a spouse and/or a dependent child or children on the date of retirement will automatically be enrolled at the maximum rate. The DoD Authorization Act for Fiscal Year 1986 (Pub. L. 99-145) provided in pertinent part that consent of the present spouse is required in order for the member: (1) To opt out of the program; (2) to participate at less than the maximum amount; or (3) to provide an annuity for a dependent child, but not for the spouse.

C. Former spouses. The Uniformed Services Former Spouse's Protection Act provides that former spouses may be beneficiaries under SBP. A former spouse election must be voluntary and cannot be court ordered contrary to the wishes of the member. The election must be accompanied by a written statement signed by the member and the former spouse indicating the former spouse as the SBP beneficiary. The written statement must set forth whether the election is being made to carry out the terms of a written agreement that resulted from divorce, dissolution or annulment proceedings and whether the written agreement is a part of a court order. The written statement must also state whether there is a present spouse who must be notified that she is not covered under SBP.

D. Amount of annuity. The monthly annuity payments shall equal 55% of the retiree's base pay. The annuity is payable to the eligible children if the spouse becomes ineligible due to remarriage before age 60 or death. The annuity will be reduced by any dependency and indemnity compensation (DIC) or social security payments received by the beneficiaries.

CHAPTER 73**TAXATION****7301 FEDERAL INCOME TAX CONSIDERATIONS FOR DESERT STORMERS****A. Presidential Combat Zone Designation**

1. The President designated the Arabian peninsula areas, airspace and adjacent waters as a combat zone, retroactive to 17 January 1991.

2. As a result, Armed Forces personnel in the Persian Gulf assigned to operation Desert Storm will not have to file their 1990 Federal income tax returns until at least 180 days after they depart from the Persian Gulf. No penalty or interest will be charged during this period on any tax due for 1990.

3. The IRS also will suspend all tax return examinations and actions to collect any back taxes owed by these taxpayers for years prior to 1990 until at least 180 days after the taxpayer leaves the combat zone. During this time no penalty or interest will be added to any tax due.

4. These relief provisions apply to military personnel serving in the Operation Desert Storm combat zone and their spouses.

5. Additionally, military pay received (after 17 January 1991) by personnel in pay grades E1 through W-4 while serving in the combat zone is exempt from Federal income tax. For commissioned officers (pay grades O-1 and above), up to \$500 a month can be excluded from income. The exclusion also extends to periods of hospitalization resulting from injury or sickness suffered while serving in the combat zone.

6. In the event a servicemember dies while serving in the combat zone, no tax is due for the year of death or any prior year in which the person served in the combat zone. Also, any unpaid tax for years prior to service in the combat zone is forgiven.

B. Tax Filing Instructions

1. Although individuals serving in the operation Desert Storm combat zone have an automatic extension of time to file their tax returns, the IRS has given special guidance for those who are due tax refunds and want to file early.

2. The words "Desert Storm" should be written at the top of 1990 Federal income tax returns and on the envelopes. Individuals filing tax returns for taxpayers serving in operation Desert Storm should also write Desert Storm on the returns and all correspondence.

3. Any notice regarding tax collection or examination matters requires no action other than writing "Desert Storm" on the top of the notice and returning it to IRS.

- a. These instructions apply to those currently serving in operation Desert Storm and servicemembers who left before 17 Jan 91.
- b. By writing Desert Storm on tax returns, correspondence, and envelopes, IRS will be alerted to taxpayers entitled to tax relief, including extension of time to file, suspension of all collection and examination actions, and suspension of interest charges on back taxes.

4. To ease tax filing, the IRS has streamlined authorization requirements for people who represent taxpayers serving in Operation Desert Storm. IRS will accept a general power of attorney or a statement signed by the taxpayer that authorizes another person to act on their behalf, even though Federal tax matters are not specified. A copy of the general power of attorney or authorization statement must be attached to the tax return. If it is not possible for the spouse of a taxpayer serving in Operation Desert Storm to obtain a signed authorization, IRS will accept a written statement explaining that the husband or wife is serving in the combat zone. This statement must be signed by the spouse filing the return and attached to the tax return.

5. Local IRS offices are prepared to help spouses and others representing taxpayers serving in Operation Desert Storm in filing tax returns, including free electronic filing of returns in those offices with that capability. IRS encourages taxpayers to telephone the IRS at 1-800-TAX-1040 or visit their nearest IRS office for help on any Federal tax matter.

7302 **STATE TAXATION.** Under 50 U.S.C. App. § 574, a servicemember neither acquires nor loses residence or domicile solely by residing in a given state pursuant to military orders. Military income is deemed to be earned in the state of domicile. A servicemember's personal property is deemed to be located in state of domicile.

A. The State's Authority to Tax

1. A state can tax all income, from whatever source derived, of domiciliaries and statutory residents. Black's Law Dictionary 572 (5th ed. rev. 1979) defines domiciliary as that place where a man has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. The definition of "resident" varies from state to state. New York Tax Law § 605 (McKinney), for example, provides: "A resident individual means an individual: (1) who is domiciled in this state, unless he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state."

2. Some states treat certain domiciliary military members as nonresidents for tax purposes. The tests for such status vary. In some states, domiciliaries who are in the military service and are stationed outside the state are not required to pay state taxes.

B. Fixing Domicile. Since domicile involves a question of intent, circumstantial factors indicating a chosen domicile include: Expressed intent, oral or written; physical presence, past and present; residence of immediate family; location of schools attended by children; payment of nonresident tuition for education; payment of income and personal property taxes; ownership of real property; leasehold interests; situs of personal property; voter registration; vehicle registration; driver's license; location of bank and investment accounts; submission of DD Form 2058 (change of domicile); home of record at the time of entering service; place of marriage; spouse's domicile; place of birth; business interests; sources of income; outside employment; declarations of residence on legal documents such as wills, deeds, mortgages, leases, contracts, etc.; address provided on federal income tax return; membership in church, civil, professional, service or fraternal organizations; ownership of burial plots; and location of finances or charitable contributions.

C. State Taxation of Income. States may tax all income, from whatever source derived, of domiciliaries and statutory residents. States may tax all income earned within the state by nonresidents. When persons are taxed by multiple states, they will likely receive relief in the form of taxation credit.

1. Servicemembers. 50 U.S.C. App. § 574 protects only military income from double taxation. A servicemember's nonmilitary income is not protected from double taxation by § 574. Nonmilitary income can be taxed by:

- a. The servicemember's state of domicile, which can tax all income from whatever source derived.
- b. The state in which the income is earned (the legal fiction that a servicemember's income is earned in the state of domicile applies only to military compensation).

2. Spouses. The rule of consequential domicile, i.e., the wife acquires the domicile of the husband upon marriage, is fading in favor of less comprehensive protection of the spouse's income. In any event, spouses are not protected by 50 U.S.C. App. § 574. Consequently, they may be taxed by:

- a. The spouse's state of domicile, which can tax all income from whatever source derived.
- b. The spouse's current host state if the spouse has become a statutory resident under that state's law.
- c. The state in which the spouse earned the income, because the state in which nonmilitary income is earned can tax that income.

D. State Taxation of Real and Personal Property

1. Real Property. The taxation of real property is not affected by § 574, because real property is taxed by the state where it is.

2. Personal Property. A servicemember's solely owned personal property, however, is deemed to be located in the servicemember's state of domicile, and only the state of domicile can tax it. The member is absolutely immune from taxation of nonbusiness personal property by the host state, regardless of whether the member pays personal property tax on the property to the state of domicile. This § 574 protection does not apply to property used by the servicemember for business or income producing purposes. With respect to such property, the situs controls.

- a. Solely-Owned Property. Personal property solely owned by the member's spouse may be taxed by the state in which the property is located. If, however, the property is located on a military reservation subject to exclusive federal jurisdiction, the property cannot be taxed by the state. The property can, however, be taxed by the spouse's state of domicile.
- b. Joint Property. Personal property which is jointly-owned or is community property may be subject to double taxation. The property can be taxed by the member's state of domicile because it is deemed to be located in that state for purposes of personal property taxation. In addition, the property can be taxed by the state in which it is physically located because situs governs taxation of the spouse's personal property.

E. Motor Vehicles. Taxation of motor vehicles follows the rules stated above for personal property. Members may enjoy a conditional immunity, however, with respect to motor vehicle fees. If the vehicle is solely owned by a nonresident member, the member is immune from "licenses, fees, or excises" imposed by the duty state with respect to motor vehicles. The member is entitled to this immunity only after meeting the license, fee, and excise requirements of the state of domicile. Immunity from fee assessment by the duty state may be lost with respect to vehicles jointly titled in both spouses' names.

1. In determining whether a charge assessed by the duty state is a personal property tax or a license, fee, or excise tax, look behind the label attached to the charge. United States v. City of Highwood, 712 F. Supp. 138 (N.D. Ill. 1989) (City fee was a disguised tax which couldn't be imposed on nondomiciliary member).

2. The taxation of house trailers and mobile homes depends on whether they are classified as real or personal property under state law. Once that classification is determined, the rules above apply. United States v. Illinois, 525 F.2d 364 (7th Cir. 1975).

3. Pursuant to their police powers, states can require compliance with pollution abatement and inspection laws, even for vehicles only temporarily located within the state pursuant to military orders.

F. Unpaid Pay and Allowances.

1. Income Tax. Pay and taxable allowances accrued but unpaid at the death of a servicemember are "income in respect of a decedent." As such, they are not included on the decedent's final return, but are included in the gross income of the recipient for the year of receipt under I.R.C. § 691. If the estate is large enough to pay estate tax, the recipient gets an income tax deduction under § 691(c) for the amount of estate tax attributable to the income in respect of a decedent included in gross income.

2. Estate Tax. Unpaid pay and allowances are included in the decedent's gross estate.

G. Death Gratuity

1. Income Tax. The death gratuity is excluded from the gross income of the recipient by I.R.C. § 134.

2. Estate Tax. The exact status of the death gratuity cannot be determined. No case or ruling has ever addressed it. In general, I.R.C. § 2033 mandates inclusion in the gross estate of all property "to the extent of the interest of the decedent therein at the time of his death." Courts have held that, on the one

hand, employee benefits which would have been paid to the employee had he lived long enough are included in the gross estate, and, on the other hand, that benefits the employer decides after death to pay gratuitously to survivors are not included in the gross estate. Unfortunately, the death gratuity falls between these two extremes. That the decedent could not receive the payment under any circumstances and cannot control the beneficiary if a spouse or children survive argues in favor of exclusion.

H. SGLI and Commercial Life Insurance

1. Income Tax. Life insurance benefits payable by reason of the death of the insured generally are not included in the recipient's gross income for Federal income tax purposes under I.R.C. § 101. Life insurance payments, however, often contain an interest component, either because there was delay between the death of the insured and the payment, or because the beneficiary has elected a deferred payment option. This interest is included in the recipient's gross income. Life insurance companies will provide an annual tax statement listing the amount of taxable interest paid.

2. Estate Tax. Proceeds of life insurance are included in the decedent's gross estate under I.R.C. § 2042 if the decedent retained any incidents of ownership over the policy, including any possibility that the policy would revert to the decedent or his or her estate. Thus, insurance proceeds are normally included, only proceeds of policies which have been fully and irrevocably transferred out of the decedent's ownership for full and adequate consideration may be fully excluded from the gross estate.

I. Dependency and Indemnity Compensation (DIC). DIC is paid by the Veteran's Administration. All payments by the VA are exempt from Federal tax under 38 U.S.C. § 3101.

J. Social Security Benefits. These benefits are not included in the member's gross estate. They may be partially included in recipients's income, depending on the amount of other income.

K. Survivor Benefit Plan (SBP) Annuities

1. Income Tax. Because amounts paid into the survivor benefit plan from the decedent's retired pay were tax free, annuity payments generally are included in the gross income of the recipient. However, if a member retires early for disability, elects SBP, and then dies prior to attaining mandatory retirement age, the beneficiary receive the first \$5,000.00 of SBP annuity payments free of Federal income tax under I.R.C. § 101. "Mandatory retirement age" is not defined in the statute, but the regulations suggest that it is age 65. This is not clear, however, because the regulations, the statute, and the legislative history of section 101 do not agree with one another on several points.

2. Estate Tax. The actuarial value of the SBP annuity is included in the decedent's gross estate.

7303 TAX REFUND INTERCEPT

A. References

1. 31 U.S.C. § 3720A
2. 31 C.F.R. part 5 (Department of Treasury regulations implementing tax refund intercept)
3. 32 C.F.R. § 90.6N.3 (DoD-IRS MoU concerning DoD participation in tax refund intercept program)
4. Family Support Act of 1988, Pub. L. 100-485, 102 Stat. 2343 (extended authority for interceptions until 10 January 1994)

B. Purpose. Tax refunds may be intercepted to offset any debt owed to the Government.

C. Procedural protections. No federal agency may take action to intercept tax refunds to satisfy a debt owed to the Government until such agency (32 C.F.R. § 90.6N.4):

1. Notifies the debtor that a debt is past due.
2. Notifies the debtor that the Government intends to refer the debt to the IRS for offset unless the debt is paid within 60 days.
3. Advises the debtor of action the debtor may take to defer or prevent offset.
4. Considers the debtor's response, if any, and determines that the debt is still enforceable.
5. Determines that the debt has been delinquent for at least three months, but not more than ten years.
6. Concludes that the debt cannot be collected under the salary offset provisions of the Debt Collection Act. (DoD regulations require DoD to use salary offset against debtors, when available. 32 C.F.R. § 90.6N4.)

7. Determines that the debts are either ineligible for administrative offset under the Debt Collection Act or cannot be collected by administrative offset from amounts payable to the debtor.
 8. Discloses the debt to a consumer reporting agency.
 9. Ensures that the debt is for at least \$25.00.
- D. Time Limit. Tax interceptions are not limited to the 6 year statute of limitations. 31 U.S.C. § 3716.
1. Although the statute of limitations for judicial enforcement of debts to the government is 6 years, the statute of limitations for administrative enforcement, such as tax refund intercept, is 10 years. 31 U.S.C. § 3716(c).
 2. The statute of limitations for intercept of student loans does not begin to run until a college assigns them to the Department of Education.

CHAPTER 74

SERVICEMEMBER PROTECTIONS

7401 **SOLDIERS' AND SAILORS' CIVIL RELIEF ACT.** For a detailed discussion of the provisions of the SSCRA, 50 U.S.C. app. §§ 501-591 (1982)], see Chapter 7 of the Naval Justice School Civil Law Study Guide or download the Professional Development Module (PDP) on the subject from the NJS electronic bulletin board. This section will be confined to the 1991 Amendments provided in Pub. L. 102-12.

A. Eviction and Distress. The 1991 amendments modified 50 U.S.C. App. § 530 (protection from eviction) by striking \$150 and substituting \$1,200, recognizing that rents have increased somewhat. The amendment applies to evictions or distress begun after July 31, 1990.

B. Extension of Power of Attorney Protection. 50 U.S.C. App. § 591 (extension of power of attorney executed by service member who is subsequently missing in action) was amended to include powers of attorney that expire after July 31, 1990.

1. Section 591 provides an automatic extension of a power of attorney for the period a service member is missing if:

- a. it was executed by a person in the military service who is now in a missing status;
- b. designates a spouse, parent, or other named relative to be the attorney in fact; and
- c. expires by its own terms after the person entered a missing status.

2. If a power of attorney is executed after the effective date of the SSCRA Amendments of 1991, and "by its terms clearly indicates that the power granted expires on the date specified," this provision probably will not act to extend the power of attorney.

C. Professional Liability Protection. This is a new section (702) in Article VII of the SSCRA and likely will be codified at 50 U.S.C. App. § 592.

1. Under this provision, health care providers, and others furnishing "services determined by SECDEF to be professional services," will be eligible to apply to have their liability insurance policies suspended during periods of active service. To qualify:

- a. they must have been ordered to active duty after 31 July 1990;
- b. and have had professional liability insurance in effect before beginning active duty.

2. No premiums will be charged during active service. Professionals will receive refunds of any premiums paid for future coverage or credit toward payment of premiums after active service ends. After active service, professionals will have 30 days to request reinstatement of insurance.

3. Liability insurance carriers will reinstate coverage on the date on which professionals transmit written requests to insurers. Minimum period of reinstatement will be the period remaining on the policy when the practitioner entered active service. No increase in premiums will be allowed except for general increases in premiums charged for coverage of other persons in the specialty.

4. This provision will provide a stay of civil actions against the professional while insurance coverage is suspended if:

- a. The action is commenced during the period of suspension;
- b. The action is based on an incident occurring before the date the suspension became effective; and
- c. The insurance will otherwise cover the alleged malpractice.

5. If an action is stayed, it will be deemed filed on date the insurance is reinstated. The statute of limitations will not run during the period of suspended insurance coverage. If the professional dies while coverage is suspended, the suspension will end upon death and the insurance carrier will be liable for malpractice claims to the same extent it would be if the professional had lived.

D. Health Insurance Reinstatement Upon Reemployment. This is a new section (703) in Article VII of the SSCRA and likely will be codified at 50 U.S.C. App. § 593. It also amends 38 U.S.C. § 2021(b).

1. Upon release from military service, persons entitled to SSCRA coverage will be entitled to reinstatement of health insurance coverage that was in effect on the day before active service began.

2. At the time active service ends and coverage is to be reinstated, insurance carriers will not be allowed to require a waiting period or exclusion of coverage for a preexisting health condition, unless the health condition is service-connected.

E. Stay of Judicial Proceedings. Unlike 50 U.S.C. App. § 521 (stay of proceedings where military service affects conduct thereof), this new provision does not require a showing of material effect.

1. An action will be stayed at any stage before final judgment when:

- a. this provision is invoked by the applicant or someone acting on the applicant's behalf;
- b. the applicant is on active duty; and
- c. the applicant is serving outside the state in which the action is located.

2. This provision had limited duration. Any stay entered remained effective only until after June 30, 1991. Additionally, it does not remedy the on-going problem of inadvertently providing personal jurisdiction when requesting a stay.

F. Exercise of Rights Under Act Not to Affect Certain Future Financial Transaction. This is a new section (108) in Article I of the SSCRA and likely will be codified at 50 U.S.C. App. § 518.

1. This provision prohibits retaliatory action against those who invoke the SSCRA. Under this amendment, an application under the provisions of the SSCRA for a stay, postponement, or suspension of any tax, fine, penalty, insurance premium, or other civil obligation or liability cannot be the basis for certain actions. Specifically, lenders cannot then determine that the service member is unable to pay an obligation or liability.

2. With respect to a credit transaction between service members and creditors, creditors cannot then deny or revoke credit, change the terms of an existing credit arrangement, refuse to grant credit in the terms requested, submit adverse credit reports to credit reporting agencies or, if an insurer, refuse to insure a service member. This amendment should be broad enough to pick up exercise of rights under § 526 limiting interest to six percent.

7402 **VETERANS' REEMPLOYMENT RIGHTS.** The 1991 amendments changed 38 U.S.C. § 2024(g) to leave no doubt that reemployment rights for reserve component service members called to active duty under 10 U.S.C. § 673b are available regardless of length of active service. The Veterans's Reemployment Rights Law (VRRL) applies to all employers, regardless of the organization's size. It protects the job and benefits of a servicemember participating in military training or giving up a civilian job to enter active duty, whether voluntary or involuntary, in peacetime or wartime. Members are entitled to return to their civilian jobs and receive pay raises, promotions, pension credit and other seniority benefits as if they had been continually employed, provided certain eligibility criteria are met. If a member is unable to settle a disputed reemployment case, the United States Attorney must provide legal representation at no cost, and on a priority hearing basis.

A. Recall for Training. Members called to active or inactive duty for training only must "request" a leave of absence from their civilian employer. The employer cannot refuse.

1. The employer is not required to pay the servicemember for time spent on military obligations, but cannot require the use of sick leave or earned vacation.

2. The member-employee must return to their civilian job at the first scheduled shift following the completion of military duties.

3. The member is entitled to be put back to work immediately without loss of seniority, status, or rate of pay. Credit towards pension benefits is not interrupted by military service.

B. Recall to Extended Active Duty. If called to extended active duty, the member is not required to request a leave of absence from the employer. Protection under the VRRL applies if:

1. The member held a job that was "other than temporary";
2. the member left this job for the purpose of entering active duty;
3. the period of active duty is less than four years;
4. the member is later discharged under honorable conditions; and
5. the member applies for reemployment within the applicable time limit.

C. Protections. The VRRL provides the following protections:

1. The member is entitled to the former job with the same seniority, benefits, pay, together with any promotion or raise the member could reasonably have expected had he remained continuously in the civilian job.

2. The employer is required to offer disabled veterans the "nearest approximation" of the job the servicemember could have reasonably expected with continuous employment.

3. The member is protected from being discharged by the employer for a certain time period following active duty, unless the employer can show misconduct. The protected time period varies with the time served on active duty.

D. Additional Information. For additional details, contact the Veterans' Employment and Training Service, Department of Labor, at (202) 523-8611.

CHAPTER 75

CONSUMER LAW

7501 INDEBTEDNESS

A. References

1. MILPERSMAN 6210140
2. LEGADMINMAN, chapter 7
3. PERSMAN 8-F

B. Policy. Debts between members and creditors are private matters. The Armed Forces will act neither as debt collector nor safe haven for those seeking to evade just obligations. USN/USMC will, however, refer qualified correspondence to the member. USCG: CO refers all correspondence to the member and responds to the creditor within 30 days, and ensures the member does also. The CO should note any good faith dispute in his reply.

C. Qualified Correspondence. (USN/USMC):

1. Debts reduced to a judgment;
2. Demonstrated compliance with the Federal Truth in Lending Act and DoD Standards of Fairness (DoD Directive 1344.9);
3. Involve types of credit not subject to Truth in Lending or DoD Standards of Fairness, e.g., utility bills, business debts, revolving credit arrangements;
4. [NAVY ONLY:] Correspondence involving types of credit where compliance with Truth in Lending and DoD Standards of Fairness has been waived per MILPERSMAN 6210140.8: debts less than \$50.00; real estate transactions; co-signers; etc.

D. Debt Collectors. The Federal Fair Debt Collection Practices Act prohibits professional debt collectors (collection agencies) from contacting employers, e.g., COs. Members may waive their rights under the Act. [See Consumer Law below.]

E. Processing Indebtedness Complaints.

1. Prior to referral to the member, the debt must be accompanied by:

- a. A court judgment for the debt; or
- b. a certificate of compliance that the transaction was made in accordance with the Truth in Lending Act and the Standards of Fairness and a statement of Full Disclosure (see appendix E-2 of the Civil Law Study Guide).

2. If the debt complies, the legal officer confronts the member. If the member acknowledges the debt as good, recommend payment. Advise the member that failure to comply may result in adverse consequences similar to those listed above for nonsupport. If a genuine dispute exists, refer the member to legal assistance. The command sends an acknowledgement to the creditor indicating the referral of the debt to the member if the debt complies. [Sample letter 3 in MILPERSMAN 6210140.3 or LEGADMINMAN 7-4).

3. If the debt is questionable, i.e., no indication of a judgment or compliance with Truth in Lending or Standards of Fairness send MILPERSMAN sample letter 2 or LEGADMINMAN 7-5. If the creditor resubmits the debt without the required forms indicating compliance, send MILPERSMAN sample letter 4, copy to Commander, NMPC.

7502 BANKRUPTCY

A. Policy. The Navy neither encourages nor discourages the filing of a petition in bankruptcy. A discharge in bankruptcy does not give a member immunity from prosecution for offenses of dishonorable failure to pay just debts committed prior to a petition of bankruptcy. MILPERSMAN, art. 6210140.3k.

B. Action. Bankruptcy involves a complex and relatively expensive legal process. Members contemplating personal bankruptcy proceedings frequently entertain misconceptions concerning the ease with which the project may be carried through and the actual rehabilitative effect bankruptcy will have on their financial status. Accordingly, servicemembers considering bankruptcy should be referred to a legal assistance officer for counseling. In all likelihood, the member will need civilian counsel.

7503 EQUAL CREDIT OPPORTUNITY**A. References**

1. Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691

2. Regulation B, 12 C.F.R. § 202 [as amended by Federal Reserve Board, with mandatory compliance beginning Apr. 1, 1990, 54 Fed. Reg. 50,514 (Dec. 7, 1989)]
3. Women's Business Ownership Act of 1988, Pub. L. No. 100-533, 102 Stat. 2689 (to be codified at 15 U.S.C. §§ 631, 636, 637, 1691)

B. General Rule Against Discrimination. It is unlawful, under both the ECOA and Reg. B, to discriminate against a credit applicant at any stage of a credit transaction on a prohibited basis.

1. Prohibited Bases. The prohibited bases are: race and color; religion; national origin; sex; marital status; age (except minority); Income based in whole or in part on a public assistance program; and the good faith exercise of rights under the Consumer Credit Protection Act or any equivalent state law in a state which has been granted an exemption from the federal statute.

2. Requesting Information. The ECOA and Reg. B prohibit: requesting information concerning an applicant's race, color, religion, national origin, sex, marital status, or age; or considering such information when evaluating a credit application.

a. Special Program Exception. Creditors offering a "special purpose credit program" intended to benefit members of a particular racial group, color, religion, national origin, sex, marital status, or age group, may request pertinent information. The creditor may not, however, use that information or otherwise administer the program so as to discriminate against the applicant.

b. Dwelling Exception. When the applicant seeks credit to fund the purchase of a dwelling, including mobile homes, creditors are REQUIRED to request information regarding an applicant's race, color, religion, national origin, sex, marital status, or age. This requirement exists to enable authorities to monitor compliance with ECOA. If the credit applicant refuses to provide the requested information, the creditor must make a visual assessment regarding race, color, national origin, and sex.

3. Other Persons Protected. The prohibition against discrimination based on race, color, religion, national origin, sex, marital status, or age may protect persons in addition to the applicant. These others include people who will benefit if the applicant obtains the credit, those who reside in the neighborhood where the property offered as collateral for the credit is located, and those whose surnames indicate that they are in a protected group even though they are not actually members of that group. Cherry v. Amoco Oil Co., 481 F. Supp. 727 (N.D. Ga. 1979).

C. Specific Rules. In addition to the general scheme outlined above, specific rules exist for several of the prohibited bases.

1. National Origin. Protection against discrimination based on national origin has been interpreted as a prohibition against discrimination based on a particular national origin. A creditor *may* inquire about an applicant's permanent residence and immigration status and may consider, when evaluating the application, the applicant's permanent residency, immigration status, and additional information which is necessary to ascertain the creditor's rights and remedies in the event of nonpayment. A creditor may refuse credit because a law, regulation, or executive order imposes limitations on dealings with the citizens of other countries. Credit refusal based on a lack of United States citizenship does not constitute discrimination on the basis of national origin but may violate 42 U.S.C. § 1981. Bhandari v. First National Bank of Commerce, 808 F.2d 1082 (5th Cir. 1987).

2. Sex. A creditor may request an applicant to designate a courtesy title (e.g., Ms., Miss, Mrs., or Mr.) on an application form. In many cases, the practice allegedly constituting discrimination based on sex has been alleged to constitute discrimination based on marital status as well. Sex discrimination includes discrimination based on: income sources generally associated with women; female co-signers; credit reports on women's spouses; and maternity leaves.

3. Marital Status. Except as provided in the general rules, creditors may request an applicant's marital status only when the application is for a joint or secured account or in certain situations in which a community property state is involved. A creditor must allow a married applicant to apply for an individual account if the applicant so desires. Applicants may be classified only as unmarried, married, or separated. "Unmarried" includes those who are single, divorced, and widowed.

a. Permitted Requests. Even when the creditor may not directly inquire about marital status, certain requests for information which indirectly disclose marital status are permitted:

- (1) Whether the applicant is responsible for paying alimony, child support, etc.;
- (2) What source of income is to be used as a basis for the repayment of the credit requested;
- (3) Whether any obligation disclosed by the applicant has a co-obligor (e.g., spouse); and

- (4) Whether the assets being relied on are owned by the applicant (or by a spouse).

b. Spouse Information. Creditors may ask information about spouses or former spouses only when the:

- (1) Spouse will be permitted to use the account;
- (2) spouse will be contractually liable on the account;
- (3) applicant is relying on the spouse's income for repayment of the credit;
- (4) applicant resides in a community property state or property relied on for repayment is located in such a state; or
- (5) the applicant is relying on alimony, child support, or separate maintenance payments for repayment.

c. Co-Signing. Creditors may not have a blanket policy requiring that spouses co-sign credit instruments. If the applicant is not individually credit-worthy, the creditor may require the personal liability of some additional person. The creditor may not, however, require that this person be the applicant's spouse.

d. Jointly-Held Property. If the applicant is relying on jointly-held property to establish credit-worthiness and may, under state law, individually transfer enough of that property to meet the creditor's credit-worthiness standards, no additional signature may be required.

- (1) If an applicant requests credit and relies on jointly-owned property to establish credit-worthiness or as security for the loan, the creditor may require the signature of the joint-owner (who is often the spouse) to allow it to reach the property in case of default.
- (2) If an applicant requests credit in a community property state or relies on property located in a community property state to establish credit-worthiness or as security for the loan, the creditor may require the spouse's signature to allow it to reach the property in case of default.

e. Income Sources. Creditors may not arbitrarily discount or refuse to consider the income of an applicant or an applicant's spouse. Creditors may not discriminate on the basis of income sources associated with divorced or separated applicants, such as alimony, child support, and separate maintenance payments. If the applicant does not want such income to be considered, the creditor is prohibited from making any inquiries regarding such income. If the applicant does wish to have such income considered to establish credit-worthiness, the creditor may not arbitrarily exclude it or count only a portion. The creditor may consider the nature of such income only to the extent that payments are likely to be consistently made.

f. Account Name. Creditors may not refuse to open or to maintain accounts in a married woman's own name. Once the decision to extend credit has been made, the creditor may not prohibit the applicant from opening or maintaining an account under: the birth-given name and surname; the spouse's surname; or a combined surname. A creditor may, however, require that all accounts opened or maintained at the same time be carried in the same name.

g. Status Changes. Creditors may not automatically require reapplication on existing open-end accounts when an account holder changes either name or marital status. The creditor can ask the account holder for "updated information" upon change of name or marital status if the information in the creditor's files is not current. The creditor may require reapplication on the basis of a change of marital status if the credit was originally granted based on income earned by the applicant's former spouse and if the account holder's income at the time credit was originally granted, considered alone, would not have supported the amount of credit currently extended.

4. Age. Provided that the applicant has the capacity to enter into a binding contract, i.e., is not legally a minor, age is a prohibited basis of adverse discrimination.

a. Credit Scoring Systems. Creditors can use any empirically derived credit system which considers age provided:

- (1) The system is "demonstrably and statistically sound.
- (2) The system cannot assign a "negative factor or value" to the age of an elderly applicant.

b. Permissible Considerations. A creditor may consider age as a factor in determining creditworthiness only to the extent that it considers:

- (1) The applicant's occupation and time remaining before retirement to ascertain whether the

applicant's income (including retirement income) would support the extension of credit until its maturity.

- (2) The adequacy of security offered by the applicant if the duration of the credit extension would exceed the applicant's life expectancy.
- (3) An applicant's age to assess the significance of the applicant's length of employment or residence at the current address.

c. Other Rules. Creditors may use credit evaluation systems which give *more* favorable treatment to elderly applicants. Creditors are prohibited from taking unfavorable actions on existing open end accounts merely because the account holder has reached a certain age or has retired. Nor may creditors discount or exclude from consideration an applicant's income derived from certain sources common among elderly persons.

5. Public Assistance Income. Protected programs include federal, state, and local governmental assistance programs that provide a continuing, periodic income supplement, whether premised on entitlement or need. Such programs include: Aid to Families with Dependent Children; food stamps; rent and mortgage supplement or assistance programs; Social Security and Supplemental Security Income; and unemployment compensation. A creditor may, however, ask whether an applicant's income derives from public assistance payments in order to determine the amount and probable continuance of the payments, the applicant's credit history, and other aspects of creditworthiness. When the public assistance is based on entitlement and will remain continuous (e.g., social security benefits), it should be considered comparable to any other form of income. A creditor may not maintain a blanket policy of refusing to extend credit to public assistance recipients.

6. The Good Faith Exercise of Consumer Rights. Protection under this section requires proof that:

- a. The consumer exercised rights provided by the Consumer Credit Protection Act or a substituted state statute;
- b. The rights were exercised in good faith; and
- c. The rights were exercised by the applicant.

D. Bringing an ECOA Action

1. Covered Transaction. To constitute an ECOA violation, the transaction must qualify as a credit transaction covered by the ECOA (15 U.S.C. § 1691a(d), 12 C.F.R. § 202.2(j)). ECOA covers transactions covered by the Truth in Lending Act (15 U.S.C. § 1602(e); 12 C.F.R. § 226.2(q)). ECOA additionally proscribes discrimination on the prohibited bases with respect to consumer transactions which do not involve more than 4 installments or carry a finance charge. Such transactions, called "incidental consumer credit," are, however, exempted from, among other Reg. B provisions, the limitations on inquiries regarding: spouses and former spouses; income derived from alimony, child support, and separate maintenance payments; and the applicant's sex. In addition to consumer transactions, the prohibition against discrimination and many of the other ECOA protections are also applied to credit extended for business or commercial purposes.

a. Transaction Life. The ECOA applies to all stages of a credit transaction. A consumer is protected by the ECOA throughout the life of a credit account, beginning with the initial application for credit and continuing through the denial of credit, the termination or modification of an existing account, final payment, and reports on the transaction by the creditor.

b. Exempt Transactions. The transaction must not be among those exempt from ECOA coverage. Three types of credit transactions are partially or totally exempt from the requirements of ECOA and Reg. B.

- (1) Special purpose credit programs designed to aid economically disadvantaged persons or the members of nonprofit organizations, or to meet "special social needs."
- (2) Classes of transactions totally or partially exempted by the FRB pursuant to statutory authority. These include: Public utility credit; securities credit; incidental consumer credit; business credit; and credit extended to a government.
- (3) Transactions in which information is requested by the federal government or by an agency with ECOA administrative enforcement powers to monitor compliance with federal anti-discrimination statutes.

2. Standing. The complainant must be an applicant who can invoke the statute's protection and recover under its remedial provisions. The ECOA defines an "applicant" as "any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit

limit." Reg. B defines "applicant" more broadly: "Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit."

3. Creditors. The party from whom credit was sought must be a "creditor." Under its definition of creditors, the ECOA includes those who regularly extend, renew, continue, or arrange credit, and their assignees. The Reg. B. definition is more narrow. This definition includes those who, in the ordinary course of business, regularly participate in the decision whether or not to offer credit and those assignees who know or have reasonable notice of the original creditor's ECOA violation. The term does NOT include creditors whose only participation in a credit transaction involves honoring a credit card.

4. Remedies. In private civil actions, consumers may recover actual damages, limited punitive damages, and attorney's fees and costs. The statute of limitations is 2 years from the date of the violation.

7404 CONSUMER PROTECTION

A. References

1. Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693
2. Truth in Lending Act, 15 U.S.C. §§ 1601-1667
3. Fair Credit Billing Act, 15 U.S.C. § 1666
4. Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t
5. Equal Credit Opportunity Act, 15 U.S.C. § 1691
6. Fair Debt Collection Practices Act, 15 U.S.C. § 1692
7. Electronic Fund Transfer Act, 15 U.S.C. § 1693
8. Fair Credit and Charge Card Disclosure Act of 1988, Pub. L. 100-583, 102 Stat. 2960 (to be codified at 15 U.S.C. §§ 1610, 1637, 1640, 1647).
9. Home Equity Loan Consumer Protection Act of 1988, Pub. L. 100-709, 102 Stat. 4725 (to be codified at 15 U.S.C. §§ 1637, 1647, 1665).
10. Equal Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619.

11. Women's Business Ownership Act of 1988, Pub. L. 100-533, 102 Stat. 2689

12. Regulation Z, 12 C.F.R. Part 226.

B. Truth in Lending Act (TILA).

1. Scope. Under 15 U.S.C. § 1602, TILA applies to:

a. Consumer credit transactions:

(1) Must be conducted for personal, family, or household purposes; and

(2) must involve creditors who regularly extend consumer credit which is: payable in more than four installments; or for which the payment of a finance charge may be required.

b. ALL credit and charge card transactions.

c. Persons who provide applications and solicitations for open-end home equity loan plans to consumers.

d. Persons who provide applications and solicitations for open-end consumer credit and charge cards.

2. 12 C.F.R. § 226, Supplement I, § 226.1(c) applies TILA and Regulation Z to those who extend consumer credit to residents (including resident aliens) of any state or territory of the U.S.

a. If the account is located in the U.S. and credit is extended to a U.S. resident, TILA and Regulation Z apply.

b. This is true regardless of whether the advance or purchase takes place in the U.S. or whether the entity extending credit is chartered or based in the U.S.

3. Credit card holders are liable for unauthorized use of the card only up to \$50. 15 U.S.C. § 1643.

a. But see Transamerica Insurance Co. v. Standard Oil Co., 325 N.W.2d 210 (N.D. 1982) (company liable for unauthorized charges in excess of \$50.00 when company continued to pay monthly bills).

- b. Check monthly billing statements.
- 4. TILA is inapplicable to:
 - a. Creditors who extend credit primarily for business purposes or other purposes which are otherwise regulated, such as securities brokers. 15 U.S.C. § 1603.
 - b. "Credit transactions, other than those in which a security interest is or will be acquired in real property, or in personal property used or expected to be used as the principal dwelling of the consumer, in which the total amount financed exceeds \$25,000." 15 U.S.C. § 1603(3).
- 5. Rescission.
 - a. Other than door-to-door sales, the remedy of rescission is available only with respect to transactions involving non-purchase-money security interests in the consumer's principal dwelling (e.g., second mortgage "equity" loans).
 - b. If the creditor makes the required "material disclosures" when such a transaction is consummated, the consumer may rescind the transaction until midnight of the third business day following consummation of the transaction or delivery of the rescission forms and material disclosures, whichever is later.
 - c. If the creditor fails to make the "material disclosures," the consumer may rescind the transaction up to three years from the date of the transaction or upon the sale of the house, whichever occurs first.

C. Electronic Fund Transfer Act (EFTA)

- 1. Authorized Transfers. The following are considered to be authorized transfers:
 - a. Transfers initiated by one furnished with means of access by the consumer.
 - b. Transfers initiated with fraudulent intent by the consumer or person acting in concert with the consumer.

- c. Transfers which constitute an "error" by a financial institution.
- 2. Consumer Liability for Unauthorized Transfers
 - a. Maximum liability of \$50 if consumer reports within 2 business days of discovery.
 - b. Maximum liability of \$500 if consumer fails to report within 2 business days of discovery.
 - c. Unlimited liability for all transactions made 60 days after transmittal of a periodic statement showing unauthorized electronic fund transfer.
- 3. Waiver. The consumer cannot waive these limitations or any other protections provided by the Act.
- 4. Error Resolution. Written or oral notice within 60 days of statement transmittal. Notice should include: the consumer's name and account number; consumer's belief that an error exists and the amount of the error; and the reasons for the consumer's belief.
- 5. Institution Action. Upon notification, the institution has 10 business days (20 days if consumer is overseas) to investigate and report the results of the investigation to the consumer. The institution, at its option, can extend the report period by provisionally recrediting the account within 10 business days of notice. Recrediting gives the bank 45 days (90 days if consumer is overseas) to investigate and report the results of the investigation to the consumer. Following completion of the investigation, the institution shall:
 - a. Correct any errors within 1 business day.
 - b. If no errors are found, so notify the consumer within 3 business days and forward copies of all documents relied upon if requested by the consumer.
- 6. Remedies. Remedies include:
 - a. Actual damages;
 - b. Statutory damages of \$100 to \$1,000;

- c. Court costs and reasonable attorney's fees;
- d. Criminal penalties of up to 1 year imprisonment and a \$5,000 fine for knowing and willful noncompliance;
- e. Criminal penalties of up to 10 years imprisonment and a \$10,000 fine for violations affecting interstate or foreign commerce; and
- f. Treble damages, in some circumstances, e.g., if the institution knowingly and willfully concludes that no error exists contrary to the available evidence.

D. Fair Credit Billing Act (FCBA). The purpose of the FCBA is to reduce the volume of consumer complaints by encouraging cooperation between consumers and creditors, by clarifying the consumer's rights and obligations, and by establishing dispute resolution procedures.

1. Applicability. The FCBA applies to open-end consumer credit transactions involving billing errors, including:

- a. Bills for transactions that never occurred;
- b. Transactions conducted by unauthorized people;
- c. Bills for erroneous amounts;
- d. Bills for goods/services that were not delivered or not accepted;
- e. Failure to properly apply credit to accounts;
- f. Computation errors; and
- g. Bills sent to incorrect addresses.

2. Procedures

- a. Consumer must notify creditor of error in writing within 60 days of creditor's transmittal of bill to consumer.
- b. Creditor must acknowledge the complaint or resolve the error within 30 days of receipt.

- c. Not later than two billing cycles (but in no event later than 90 days) after the creditor's receipt of the debtor's notice of error, the creditor must either:
 - (1) Make appropriate corrections in the debtor's account; or
 - (2) Conduct an investigation and send the debtor a written explanation of why the creditor believes the debtor's account was correctly shown in the statement.
- d. Pending resolution of a billing dispute, a creditor operating an open-end consumer credit plan may not, prior to sending the written explanation or clarification to the debtor: Take any collection action; restrict or close the account in issue; or report or threaten to report adversely on the debtor's credit rating based on the disputed amount.
- e. The creditor may, however, apply the unpaid amount against the debtor's credit limit.

3. Remedies. Remedies available are similar to those under the EFTA above. If the creditor violates the billing error resolution procedures, the consumer recovers from the creditor the disputed amount and any finance charges thereon up to \$50. If the billing issue remains unresolved, the consumer's claims and defenses can be asserted directly against the credit card issuer if:

- a. The consumer has made a good faith effort to resolve the problem with the individual honoring the card;
- b. The amount of the initial transaction exceeds \$50;
- c. The initial transaction was in the same state as the cardholder's designated address or within 100 miles of such address; and
- d. The merchant is not the same as or controlled by the card issuer.

E. Fair Credit Reporting Act (FCRA). The purpose of the FCRA is to ensure that the credit reports on which the banking industry depends are current, accurate, and fair and that the reporting agencies respect the consumer's right to privacy.

1. Consumer Reporting Agencies (CRAs). CRAs are those entities that "regularly engage in . . . the practice of assembling or evaluating consumer credit information on consumers for the purpose of furnishing consumer reports to third parties."

A CRA is not a creditor; FCRA does not regulate reports by creditors to CRAs.

2. Release. CRA's may furnish consumer reports only:

- a. In response to a court order;
- b. With the consumer's consent; or
- c. To a person who the CRA "has reason to believe" intends to use the report:
 - (1) In connection with the consumer's credit transaction;
 - (2) For employment purposes;
 - (3) For the consumer's insurance;
 - (4) In connection with the consumer's eligibility for a license or other government benefit; or
 - (5) In connection with the consumer's business transaction where the user has a legitimate business need.

3. Obsolete Information. Unless otherwise specified, the following information is considered "obsolete" and cannot be included in a CRA's consumer report:

- a. Paid tax liens that antedate the consumer report by more than 7 years;
- b. Accounts placed for collection, or charged to profit and loss that antedate the consumer report by more than 7 years;
- c. Records of criminal arrest, indictment, or conviction which, from the date of disposition, release, or parole, antedate the consumer report by more than 7 years;
- d. Suits and judgments which, from the date of entry, antedate the consumer report by more than 7 years or

until the governing statute of limitations has expired, whichever is the longer period;

- e. Bankruptcy adjudications which antedate the consumer report by more than 10 years.

4. Using "Obsolete" Information. "Obsolete" information CAN be included in the consumer report IF the report is intended for use involving:

- a. The consumer's participation in a credit transaction of \$50,000 or more;
- b. Issuance of life insurance coverage on the consumer of \$50,000 or more; or
- c. Employment of the consumer at an annual salary of \$20,000 or more.

5. Consumers' Rights

- a. Upon request, the consumer can obtain (15 U.S.C. § 1681g):
 - (1) A summary of the nature and substance of the information in the CRA's files.
 - (2) The identities of those who have received the report:
 - (a) Within the past 2 years for employment purposes.
 - (b) Within the past 6 months for other purposes.
- b. If the consumer disputes the completeness or accuracy of the report, the CRA must reinvestigate and record the current status of the disputed information unless the CRA has reason to believe that the dispute is frivolous or irrelevant. 15 U.S.C. § 1681i.
- c. If the investigation does not resolve the dispute, the consumer may file a brief statement. In future reports, the CRA must note that the entry is disputed by the consumer and provide the consumer's statement.

- d. If the investigation reveals that the disputed entry is inaccurate or can no longer be verified, the CRA must delete the information.
- e. Following either correction of the report or receipt of a consumer's statement in rebuttal, the CRA must furnish a copy of the annotated report (and consumer's statement, where appropriate) to "any person specifically designated by the consumer" who has received the report:
 - (1) Within the past 2 years for employers.
 - (2) Within the past 6 months for others.

6. Remedies

- a. Civil liability for willful noncompliance: actual damages, punitive damages, and court costs and reasonable attorney's fees if the consumer prevails.
- b. Civil liability for negligent noncompliance: actual damages plus court costs and reasonable attorney's fees if the consumer prevails.
- c. Criminal penalties for obtaining information under false pretenses: maximum penalty of \$5,000 fine and imprisonment for one year.

7. Current Problems with the FCRA. Creditors send reports to CRAs on a monthly basis, not just when adverse information occurs. Creditors report minor as well as substantial adverse information. Adverse information, even of a minor nature stays in credit records for 7 years. Consumers are not notified when creditors send in reports to CRAs. The FCRA does not require accurate credit reports; CRAs must only follow "reasonable procedures" to avoid errors. The definition of "legitimate business need" for release does not protect consumers from improper releases. Although the CRA must give consumers the nature and substance of information in its files, it has the latitude to refuse to give consumers copies of their credit files. Creditors may develop lists of qualifications for credit and send the lists to CRA along with a list of names of consumers they want checked for creditworthiness. The FCRA has no provision that allows a consumer to dispute an item of information in a credit report with the creditor who furnished the information to the CRA in the first place.

F. Cooling-Off Period for Door-to-Door Sales. The FTC promulgated the home solicitations trade practices rule (16 C.F.R. Part 429) because it believed that door-to-door sales were especially prone to fraud and predatory practices. The rule permits a consumer to withdraw unilaterally from contracts resulting from door-to-door solicitations.

1. "Door-to-Door Sale" Defined. A door-to-door sale is:
 - a. a sale, lease, or rental of consumer goods or services;
 - b. with a purchase price of \$25 or more;
 - c. in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by the buyer; and
 - d. the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller. 16 C.F.R. § 429.1, Note 1(a).
2. Door-to-door sales under 16 C.F.R. Part 429 do not include:
 - a. Transactions conducted and consummated entirely by phone.
 - b. Transactions in which the buyer has initiated the contact and the goods or services are needed to meet a bona fide immediate personal emergency of the buyer and the buyer furnishes the seller with a signed statement so stating.
 - c. Transactions in which the buyer has contacted the seller and specifically requested that the seller visit the buyer's home to perform repair or maintenance work on the buyer's personal property.
 - d. Sales of automobiles at public auctions and tent sales if the seller has at least one permanent place of business. 53 Fed. Reg. 45455 (Nov. 10, 1988).
 - e. Sales of arts and crafts at fairs, shopping malls, civic centers, community centers, and schools. 53 Fed. Reg. 45455 (Nov. 10, 1988).

3. The Federal Trade Commission has determined that it is a deceptive trade practice if, among other practices, a door-to-door sales representative (16 C.F.R. § 429.1):

- a. Fails to furnish the buyer with a contract informing the buyer of the right to cancel the transaction within 3 business days, where the contract is in the same language as that in which the sale was negotiated.
- b. Fails to furnish the buyer an easily detachable cancellation form in the language in which the sale was negotiated, stating the seller's name and address and the date by which the transaction may be cancelled. This can be a copy of the contract as long as it contains the cancellation language.
- c. Fails to inform the buyer orally of the right to cancel or misrepresents the buyer's right to cancel.
- d. Fails to honor a valid notice of cancellation and to refund any payments made within 10 days of the cancellation.

4. Buyer's responsibilities to effect cancellation:

- a. Mail or deliver to the seller a signed and dated copy of the notice of cancellation within 3 business days of the transaction.
- b. Make any goods delivered by the seller available to the seller at the buyer's residence in substantially as good condition as when received, or comply with the seller's instructions regarding the return of the goods at the seller's risk and expense.
- c. If the buyer fails to make the goods available to the seller, the buyer remains liable for performance of all obligations under the contract.
- d. If the seller fails to collect any goods delivered to the buyer within 20 days of the date of the notice of cancellation, the buyer may retain or dispose of the goods without any further obligation.

5. Remedies

- a. Rescission (for any reason or no reason) during the 3-day cooling-off period. The consumer has an automatic right to rescind such contracts by midnight of the third business day after the date of the transaction to cancel. Sundays and federal holidays are not included within the 3-day cancellation period.
 - b. Otherwise, for failure to comply with disclosure requirements:
 - 1. Treatment as an unfair or deceptive trade practice under state law. State remedies may include rescission of the contract.
 - 2. Treatment under state laws respecting door-to-door sales, where appropriate. State remedies may include rescission of the contract.
 - 3. Look to state law and argue rescission beyond 3 business days when notice to rescind was not given or was inadequate.
6. Effecting cancellation. Cancellation is effected by:
- a. Mailing to the seller the signed and dated notice of cancellation provided by the seller at the time of the sale;
 - b. Sending the seller any other written notice; or
 - c. Sending the seller a telegram.

CHAPTER 76

PRACTICE AIDS

SAMPLE LETTER TO CREDITOR ON INSTALLMENT CONTRACT

(DATE)
(YOUR NAME)
(YOUR ADDRESS)

(CREDITOR'S NAME)
(CREDITOR'S ADDRESS)

RE: (YOUR ACCOUNT NUMBER)

Dear Sir or Madam:

This is to advise you that I have been ordered to active service with the United States [Navy][Marine Corps]. As a result of my call-up, and for its duration, I will lose my civilian employment income. My ability to repay the above referenced debt as previously agreed has been materially affected by the temporary reduction in my income attendant to this situation. I will send what amounts I can during this period and resume normal payments upon my return. I estimate that my period of active service will end on _____, and I will notify you in writing upon that event.

I understand that the Soldiers' and Sailors' Civil Relief Act prohibits the exercise of a right or option to unilaterally rescind or cancel this contract or repossess any property for non-payment of any installment due prior to or during the period of my military service. (50 U.S.C. App. § 531). I also understand that the Act prohibits the imposition of a default judgment against me unless the court appoints an attorney to represent my interest. (50 U.S.C. App. § 520 and § 521.) Lastly, I am aware that the Act limits the rate of interest on this debt to six percent (6%) per annum while I am on active service. (50 U.S.C. App. § 526). As used in the Act, the term "interest" includes service charges, carrying charges, renewal charges, fees and any other charges (except bona fide insurance) in respect of such obligation or liability. My dependents are also provided protection under the Act if they co-signed on the obligation. Upon receipt of this request, please adjust my account to reflect the statutory six per cent rate and notify me of the revised payment schedule.

Thank you for your understanding and cooperation in this matter. I regret any inconvenience this may cause.

Sincerely,

SAMPLE LETTER TO LANDLORD WHEN TERMINATING RENTAL

(DATE)
(YOUR NAME)
(ADDRESS)

(LANDLORD'S NAME)
(LANDLORD'S ADDRESS)

RE: (RENTAL OF (ADDRESS OF RENTAL PROPERTY))

Dear Sir or Madam:

This is to advise you that I have been ordered to active service with the United States [Navy][Marine Corps]. Due to this unexpected situation, and in order to carry out my orders, I must terminate my lease/rental agreement concerning the above referenced property.

The Soldiers' and Sailors' Civil Relief Act provides for this action in Title 50 U.S.C App. § 534. According to this Section, month to month rentals will terminate thirty days after the first date on which the next rental payment is due subsequent to the date when this notice is mailed. Using this formula, the lease will terminate on ____ I will vacate the premises by that date.

Please forward my security deposit and any prepaid rent covering periods after the termination of the lease to the following address: _____

Thank you for your understanding and cooperation in this matter. I regret any inconvenience this may cause.

Sincerely,

SAMPLE LETTER TO MORTGAGE OR TRUST DEED HOLDER

(DATE)
(YOUR NAME)
(YOUR ADDRESS)

(CREDITOR'S NAME)
(CREDITOR'S ADDRESS)

RE: (YOUR ACCOUNT NUMBER)

Dear Sir or Madam:

This is to advise you that I have been ordered to active service with the United States [Navy][Marine Corps]. As a result of my call-up, and for its duration, I will lose my civilian employment income. My ability to repay the above referenced debt as previously agreed has been materially affected by the temporary reduction in my income attendant to this situation. I will send what amounts I can during this period and resume normal payments upon my return. I estimate that my period of active service will end on _____, and will notify you in writing upon that event.

I understand that the Soldiers' and Sailors' Civil Relief Act prohibits the sale, foreclosure, or seizure of property for non-payment of any sum due under this obligation, or for any other breach of the terms of the contract, prior to or during the period of my military service or for three months thereafter. (50 U.S.C. App. § 532). I also understand that the Act prohibits the imposition of a default judgment against me unless the court appoints an attorney to represent my interests. (50 U.S.C. App. § 520 and § 521). Lastly, I am aware that the Act limits the rate of interest on this debt to six percent (6%) per annum while I am on active service. (50 U.S.C. App. § 526). As used in the Act, the term "interest" includes service charges, carrying charges, renewal charges, fees and any other charges (except bona fide insurance) in respect of such obligation or liability. My dependents are also provided protection under the Act if they co-signed on the obligation. Upon receipt of this request, please adjust my account to reflect the statutory six per cent rate and notify me of the revised payment schedule.

Thank you for your understanding and cooperation in this matter. I regret any inconvenience this may cause.

Sincerely,

SAMPLE WILL WORKSHEET

PLEASE READ THIS PAGE AND COMPLETE THE NEXT PAGE OF THE WORKSHEET

BEFORE YOU SEE THE ATTORNEY. THIS PAGE IS YOURS TO KEEP.
DO NOT GO BEYOND THE NEXT PAGE UNTIL YOU SEE THE ATTORNEY.

WHAT IS A WILL? A Will is a legal document that takes effect if you die. The main purpose of a will is to dispose of your property (known as your "estate") after your death.

WHAT HAPPENS IF I DON'T HAVE A WILL? Your property would go to the persons designated by the laws of your State. This usually means the property will go to your spouse and/or children, or, if you have no spouse or children, to your closest relatives (e.g., parents, siblings, etc.). The only way to ensure that your property goes to the right person is to have a Will.

IS THERE PROPERTY THAT DOESN'T PASS UNDER MY WILL? YES!

Property titled jointly with a right of survivorship, e.g., such as bank accounts, savings bonds, and often your house, will go to the surviving party. Also, life insurance proceeds, including SGLI, are paid to whoever is designated as the insurance beneficiary. **DO NOT DEPEND ON THE WILL TO GET SUCH PROPERTY TO THE RIGHT PERSON AFTER YOU DIE.**

WHO IS THE EXECUTOR? He is the person who is put in charge of your estate. Also called an Independent Administrator, the Executor will use your property to pay off your funeral expenses, debts, and any taxes on your estate, and then give whatever is left to the person(s) designated in your Will.

WHO WILL TAKE CARE OF MY MINOR CHILDREN? The court will appoint a guardian for your minor children if you should die. Normally this will be the child's other natural or adoptive parent, if he/she is alive. (This is true even if you are divorced from the child's other parent.) You can use your Will to nominate a guardian if the other parent should die before you.

WHERE IS THE WILL PROBATED? Your Will will be probated in the State of your LEGAL RESIDENCE, or "domicile." The attorney will explain what this term means.

WHAT ABOUT ESTATE TAXES? To see if you need to talk to the Legal Assistance Attorney about Federal estate taxes, take this simple test:

1. Estimate the value of all property you and your spouse own, including your house, investments, etc.

2. Add the face amount of all life insurance policies you and your spouse own. (The face amount is the amount that would be paid to your beneficiary.)

3. If the total of #1 and #2 is more than \$600,000, you should talk to the Attorney. (See question #11 on the next page.)

THIS PAGE IS YOURS TO KEEP

(PLEASE PRINT LEGIBLY - DO NOT ABBREVIATE!)

Disk #: __

BACKGROUND INFORMATION

1. FULL NAME: _____
First Middle Name (Maiden) Last

2. Command: _____

3. Home Mailing Address:
(include zip code)

4. Work phone number: _____ Home phone number: _____

5. Military Status: Active Duty _____ Reserve (Active Duty)
Retired _____ Dependent _____

6. Your rank, or the rank of your sponsor:

7. If you are a dependent: Is your sponsor: ACDU _____ Retired _____

Have you ever served in the U.S. Armed Forces? YES NO

8. Status: Single _____ Divorced _____ Widowed _____

Marital Married _____ separated _____ Other _____

9. SPOUSE'S FULL NAME: _____
First Middle Name (Maiden) Last

Is your spouse also getting a will today? YES NO

10. CHILDREN: List ALL children, including adopted and stepchildren:

Relationship

Full Name Sex Age (see codes below)

RELATIONSHIP CODES:

Your natural child by present marriage:
PM Your natural child by former marriage: FM Your spouse's
child, but not yours: SC A child you have adopted: A Your
natural child, born out of wedlock: OW

10a. For children from a prior marriage,
is the other natural parent (circle one): ALIVE DECEASED

11. Do you need to talk to the attorney about estate taxes? YES NO

*****STOP HERE UNTIL YOU HAVE SEEN THE
ATTORNEY*****

LEGAL RESIDENCE

12. State of Legal Residence:

DISPOSITION OF YOUR PROPERTY

13. Do you want to make a specific bequest? YES NO

Item:

Beneficiary:

Name (first, middle name, maiden, last) Relationship

(If you need more room, use a separate sheet of paper.)

14. SIMPLE WILL OPTIONS. If one of these options meets your needs, it will be easier for us and quicker for you.

___ a. BASIC MARRIED WILL: All of your property would be left to your spouse, if he/she survives you. If not, it would all go to your children, including any future children, or to the children of any child who failed to survive you. If

you were not survived by your spouse or any of your descendants, your property would all go to the person or persons you designate, equally, or to the survivor:

First Name Middle (Maiden) Last Name Relationship

First Name Middle (Maiden) Last Name Relationship

____ b. BASIC SINGLE PARENT WILL: All of your property would be left to your children, including any future children, or to the children of any child who failed to survive you. If you were not survived by any of your descendants, your property would all go to the person or persons you designate, equally, or to the survivor:

First Name Middle (Maiden) Last Name Relationship

First Name Middle (Maiden) Last Name Relationship

____ c. BASIC SINGLE WILL: All of your property would be left to your parent(s), equally, or to the survivor. If they failed to survive you, then your property would all go to the person or persons you designate (see ALTERNATE, below), equally, or to the survivor:

Mother's Full Name:

Father's Full Name: _____

ALTERNATE: _____ First
Middle (Maiden) Last Name Relationship

IF YOU ANSWERED QUESTION #14. Do NOT ANSWER #15.

15. CUSTOM WILL. Please indicate who you want to receive your property, in order of preference. (Put a "1" by your first choice, a "2" by your second choice, and a "3" by your third choice.

____ Your spouse. (NOTE: Your spouse may receive part of your estate even if you disinherit him/her. Ask the attorney.)

____ Your children

Including stepchildren? YES NO

If one of your children should die before you, who should receive his/her share (check one)?

☐ His/her children (your grandchildren); OR

☐ Your other surviving children.

☐ Your parents (equal shares to each, or the survivor; if both predecease you, then to their children). Please provide the following:

Mother's Full Name: _____

Father's Full Name: _____

☐ 1/2 to your parents and 1/2 to your spouse's parents (equal shares to each, or the survivor; if both parents predecease you, then to their children). Provide the following:

Mother's Full Name: _____

Father's Full Name: _____

Mother-in-Law's Full Name: _____

Father-in-Law's Full Name: _____

☐ Others, as follows:

☐ % to: _____
Name (full) Relationship

☐ % to: _____
Name (full) Relationship

☐ % to: _____
Name (full) Relationship

EXECUTOR

16. Do you want your spouse to be your Executor? YES NO

a. If NO, or if not married, who would act as Executor?

Name (first, middle, maiden, last) relationship

City and State: _____

- b. Who would you want as Executor if your spouse or the person named in "a" cannot or will not do so:

Alternate
EXECUTOR:

Name (first, middle, maiden, last) relationship

City and State: _____

GUARDIANSHIP/TRUST

17. Who do you want to take care of your children (if the child's natural parent can't or won't)?

GUARDIAN:

Name (first, middle, maiden, last) relationship

City and State: _____

ALTERNATE:

Name (first, middle, maiden, last) relationship

City and State: _____

18. If a minor receives property under this will, please check one of the following (the attorney will explain them):

___ To minor's parent/guardian under UGMA/UTMA

___ Combined trust until last child reaches age

- a. If you checked "combined trust," do you want the child's
parent or guardian to act as Trustee? YES NO

- b. IF NO, please name a trustee and alternate:

TRUSTEE:

Name (first, middle, maiden, last) relationship

City and State: _____

ALTERNATE:

Name (first, middle, maiden, last) relationship

City and State: _____

c. Contingent beneficiary:

Name (first, middle, maiden, last) relationship

City and State: _____

**SAMPLE
LAST WILL AND TESTAMENT
OF
(TESTATOR)**

I, (Testator), a legal resident of the State of _____, being eighteen or more years of age, of sound and disposing mind and memory, and not acting under any duress, menace, fraud or undue influence, declare this to be my Last Will and Testament. I revoke all prior Wills and Codicils.

DEFINITIONS. The following definitions apply to the terms used in this Will.

(1) I am married to _____. All references in this Will to "my spouse" are to that person so long as we remain married.

(2) References in this Will to "my children" include _____ and any children hereinafter born to or adopted by me.

(3) The term "my estate" includes all property owned by me at the time of my death, of every kind and description, real, personal, or mixed (including lapsed legacies and devises, and any property over which I have a power of appointment), wherever situated, and whether acquired before or after the execution of this Will.

(4) The term "Personal Representative." shall refer to the person who administers my estate after my death (also known as an Executor), and shall specifically include any alternate Personal Representative nominated by me when appointed or functioning as the primary Personal Representative.

PAYMENT OF DEBTS. I direct that all of my unsecured personal debts and my funeral expenses be paid from my estate prior to distribution, if my Personal Representative so desires; otherwise such debts will be apportioned to each devisee and legatee according to his or her share. Debts secured by any property shall not be required to be exonerated, but shall pass with the property. Taxes, excepting inheritance taxes levied on the devisees and legatees, shall be paid from the residuary portion of my estate.

SURVIVORSHIP REQUIREMENT. Wherever in this Will it is provided that any person will benefit if such person survives me, that person will be deemed not to have survived me if he or she dies within thirty (30) days after my death.

SPECIFIC BEQUEST. I devise and bequeath to _____, if _____ survives me, my _____. If _____ does not survive me, I devise and bequeath said property to my residuary estate for disposition under the provisions of the Residuary Clause of this Will.

RESIDUARY CLAUSE. I devise and bequeath the remainder and residue of my estate . . .

TO SPOUSE, THEN TO CHILDREN, PER CAPITA: to my spouse, if my spouse survives me. If my spouse does not survive me, I devise and bequeath the remainder and residue of my estate to my children who survive me, in approximately equal shares.

TO SPOUSE, THEN TO CHILDREN, PER STIRPES (STANDARD MARRIED WILL): to my spouse, if my spouse survives me. If my spouse does not survive me, I devise and bequeath the remainder and residue of my estate to my children who survive me, in approximately equal shares, or to the surviving issue of any child who fails to survive me, taking by representation. If any of my children die without surviving issue, his or her share shall be divided among the surviving children and the surviving issue of any child who failed to survive me, taking by representation.

TO CHILDREN, PER CAPITA: to my children who survive me, in approximately equal shares.

TO CHILDREN, PER STIRPES (STANDARD SINGLE PARENT WILL): to my children who survive me, in approximately equal shares, or to the surviving issue of any child who fails to survive me, taking by representation. If any of my children die without surviving issue, his or her share shall be divided among the surviving children and the surviving issue of any child who failed to survive me, taking by representation.

TO PARENTS (STANDARD SINGLE WILL): to my mother, _____, and to my father, _____, if they survive me, in approximately equal shares, or to the survivor.

TO SINGLE BENEFICIARY: to my _____, _____, if _____ survives me.

TO MULTIPLE BENEFICIARIES, OR SURVIVOR: to my _____, _____; to my _____, _____; and to my _____, _____; if they survive me, in approximately equal shares, or to the survivor.

TO MULTIPLE BENEFICIARIES IN UNEQUAL SHARES: as follows:

(1) _____ percent (____%) to my _____, _____, if ____ survives me. If ____ does not survive me, then I devise and bequeath such property to my _____, _____.

(2) _____ percent (____%) to my _____, _____, if ____ survives me. If ____ does not survive me, then I devise and bequeath such property to my _____, _____.

TERTIARY CLAUSE. If I am not survived by any beneficiary named or provided for in the Residuary Clause of this Will, I devise and bequeath the remainder and residue of my estate to _____.

TO PARENTS IF SPOUSE AND CHILDREN PREDECEASE: If I am not survived by any beneficiary named or provided for in the Residuary Clause of this Will, I devise and bequeath one-half (1/2) of the residue and remainder of my estate to my mother, _____, and to my father, _____, or to the survivor of them, or if none, to their descendants taking by representation; and one-half (1/2) thereof unto my spouse's mother, _____ and to my spouse's father, _____, or to the survivor of them, or if none, to their descendants taking by representation.

PERSONAL REPRESENTATIVE. I nominate and appoint as Personal Representative of this Will . . .

SPOUSE AS PRIMARY: my spouse. If for any reason my spouse is unable or unwilling to serve or continue to serve, then I nominate and appoint as substitute or successor Personal Representative my _____, _____ of _____. I direct that my Personal Representative be permitted to serve without bond or other security.

NON-SPOUSE AS PRIMARY: my _____, _____, of _____. If for any reason that person is unable or unwilling to serve or continue to serve, then I nominate and appoint as substitute or successor Personal Representative my _____, _____, of _____. I direct that my Personal Representative be permitted to serve without bond or other security.

POWERS OF PERSONAL REPRESENTATIVE. By way of illustration and not of limitation, and in addition to any powers granted any Personal Representative by law, I authorize my Personal Representative the absolute discretion to sell, exchange, convey, transfer, assign, mortgage, pledge, lease, or rent the whole or any part of my estate, to invest, reinvest, sell, or retain investments of my estate, and to perform all acts and to execute all documents

which my Personal Representative may deem necessary, convenient or proper in regard to my estate. It is my intention that my Personal Representative shall be as free and independent of court supervision as the law of the appropriate jurisdiction in which this Will is probated allows.

ANCILLARY ADMINISTRATION. If it becomes necessary to have ancillary administration of my estate in any jurisdiction where the Personal Representative is unable or does not desire to qualify as ancillary legal representative, I appoint as such ancillary legal representative such individual or corporation as my Personal Representative shall designate, in writing. I direct that any balance of my property remaining after such ancillary administration be delivered, to the extent permitted by law, to my Personal Representative for disposition in accordance with the terms of this Will. I direct that all of the powers or privileges and immunities granted my Personal Representative hereunder shall also apply to any such legal representative. I further direct that such ancillary legal representative shall not be required to give any bond or other security for the faithful performance of his or its duties, or if any bond is required, neither he nor it shall be required to give any surety thereon.

GUARDIANSHIP

NO CHILDREN FROM PRIOR MARRIAGE: In the event that my spouse shall predecease me, I nominate and appoint _____ as Guardian of the person of each minor child of mine who shall survive me, during his or her minority. If this individual is unable or unwilling to serve, then I nominate and appoint _____ as successor Guardian. I further direct that, to the extent permitted by law, my appointed Guardian or successor Guardian shall serve without bond and without being subject to the control of any Probate Court.

CHILDREN FROM PRIOR MARRIAGE (INCLUDING SINGLE PARENTS): In the event that my children's other natural parent shall predecease me, I nominate and appoint _____ as Guardian of the person of each minor child of mine who shall survive me, during his or her minority. If this individual is unable or unwilling to serve, then I nominate and appoint _____ as successor Guardian. I further direct that, to the extent permitted by law, my appointed Guardian or successor Guardian shall serve without bond and without being subject to the control of any Probate Court.

CHILDREN FROM PRIOR MARRIAGE. OTHER NATURAL PARENT DECEASED: My children's other natural parent is deceased. Therefore, in the event of my death, I nominate and appoint _____ as Guardian of the person of each minor child of mine who shall survive me, during his or her minority. If this individual is unable or unwilling to serve, then I nominate and appoint as successor Guardian. I further direct that, to the extent permitted by

law, my appointed Guardian or successor Guardian shall serve without bond and without being subject to the control of any Probate Court.

BEQUEST TO MINOR. If any beneficiary to this Will is a minor, I direct that his or her share be given to his or her guardian of the person as custodian under the Uniform Transfers to Minors Act--or alternatively, under the Uniform Gifts to Minors Act--as that statute has been adopted by the State where this Will is probated or of any other State of competent jurisdiction, to be managed, held, and distributed in accordance with the provisions of said Act. If neither of these Acts has been adopted, then I direct that the guardian of the person of the minor beneficiary shall be given the beneficiary's share as guardian of that property for the benefit of the beneficiary, under such laws, terms, and conditions as customarily apply to a guardian of property for a minor. In any event, I direct that no bond or other security shall be required of the guardian of the person.

MILITARY SURVIVORS' BENEFITS. I direct my Personal Representative to consult the nearest military Legal Assistance Attorney, the nearest Veterans Administration Office, and the nearest Social Security Administration Office to ascertain if there are any benefits to which my survivors may be entitled by virtue of my military affiliation.

MUTUAL WILLS: Although my spouse and I are at approximately the same time executing similar Wills, these Wills are not the result of any contract or agreement between us, and either Will may be revoked or amended at any time at the sole discretion of the maker thereof.

INOPERABLE PROVISIONS: If any part of this Will shall be invalid, illegal, or inoperative for any reason, it is my intention that the remaining parts, so far as possible and reasonable, shall be effective and fully operative. My Personal Representative may seek and obtain court instructions for the purpose of carrying out as nearly as may be possible the intention of this Will as shown by the terms hereof, including the term held invalid, illegal, or inoperative.

IN WITNESS WHEREOF I have hereunto set my hand and seal in the presence of the witnesses whose names appear hereafter, published this ____ day of _____, 19__.

(Testator) (SEAL)

On this _____ day of _____ 19__
(Testator) personally signed and declared the foregoing instrument to be ___ Last Will and Testament, in the presence of each of us and all of us together, who, at

___ request, in ___ presence, and in the presence of each other, also signed the said instrument as witnesses. We further state that each of us believes that at the time ___ executed the foregoing instrument ___ was of sound mind and memory, of lawful age, and did so execute it as ___ own free act and deed and not under the unlawful influence of any person.

_____ of Naval Legal Service Office
Pearl Harbor, Hawaii 96860-5110

_____ of Naval Legal Service Office
Pearl Harbor, Hawaii 96860-5110

_____ of Naval Legal Service Office
Pearl Harbor, Hawaii 96860-5110

MISCELLANEOUS PROVISIONS

CONTEMPLATION OF MARRIAGE. I make this Will in contemplation of marriage to ____; therefore, this Will should not be considered automatically revoked in the event of such marriage.

CONTEMPLATION OF DIVORCE. I am presently in the process of obtaining a divorce from my spouse, and therefore I have made no disposition, and intend that none be made, for the benefit of my spouse. If my spouse is entitled by law to receive a portion of my estate, notwithstanding the intent expressed in my Will, it shall in no case be greater than that which is minimally required.

INTENTIONAL OMISSION OF SPOUSE. I have knowingly and intentionally made no provision for my spouse in this Will. If my spouse is entitled by law to receive a portion of my estate, notwithstanding the intent expressed in my Will, it shall in no case be greater than that which is minimally required.

INTENTIONAL OMISSION OF CHILDREN. I know that I have the following child(ren): _____. I have knowingly and intentionally made no provision in this Will for these children.

TRUST. If all or any portion of my estate would be distributed to any child or children who are under the age of ____ at the time of such distribution, then I direct that the portion of my estate to be distributed to such child or children shall be distributed to

TO GUARDIAN: the Guardian of the person of such child or children, in trust, for the benefit of such child or children, to hold, administer, and distribute the property as follows. For this purpose, the term "Guardian of the person" shall include any person who has been appointed as Guardian by a court of competent jurisdiction, or if none, any person who lawfully has physical custody of such child or children.

TO DESIGNATED TRUSTEE AND ALTERNATE TRUSTEE:
_____, of _____ in trust, for the benefit of my child or children, to hold, administer, and distribute the property as follows. If this person should fail or cease to serve as Trustee for any reason, then said portion shall be distributed to my alternate Trustee, _____, of _____ upon the same terms and conditions and with the same powers and duties given my Trustee.

1. **TERMINATION.** This trust shall terminate upon the occurrence of any of the following:

a. When there is no living child of mine under the age of ____ years; or

b. If the assets of this trust are reduced to a sum which, in my Trustees sole discretion, would not be economical to continue in trust; or

c. In any event, at the expiration of twenty-one (21) years after my death.

2. **DISTRIBUTION UPON TERMINATION.** Upon the termination of this trust, as set forth in sub-paragraph 1, above, my Trustee shall distribute the remaining trust assets to my then living children, in approximately equal shares, and to the issue of any deceased child, taking by right of representation; or if there are no children of mine then living, or surviving issue, then to _____. If a distributee is a minor, his or her share shall be paid to the guardian of the person as custodian under the Uniform Transfers to Minors Act, or alternatively under the Uniform Gifts to Minors Act, of the State in which

the guardian resides, or any other State of competent jurisdiction, to be held, administered and distributed in accordance with the provisions of said Act.

3. **PURPOSE OF TRUST.** The purpose of this trust is to provide for the support, maintenance, medical expenses, and general welfare of my child or children during the term of this Trust. My secondary objective is to provide funds for the education of my child or children, including college or equivalent preparation in business, technical or trade training. The Trustee should not be conservative in making interim distributions of principal and income simply to provide lump-sum gifts upon the termination of the trust.

4. **INTERIM DISTRIBUTIONS.** Such of the income and corpus as is needed (even to the exhaustion of the trust) shall be applied or distributed by my Trustee, in cash or in kind, for the support and education of each child. Distribution shall be made in such manner and amounts as my Trustee believes will fulfill the purposes of the trust. The decision of my Trustee to make distribution for these purposes shall be conclusive. My Trustee is authorized to make such distributions to the child, to his Guardian of the person, or to any other person in behalf of the child, without the Trustee being liable to see to the application thereof. Amounts so distributed shall not be taken into account in making the division of the trust as provided in sub-paragraph 2, above.

5. **PREMATURE DEATH OF A BENEFICIARY.** If any child of mine dies before the principal of this trust is fully distributed, my Trustee may, in his or her discretion, pay from the trust assets the expenses of that child's last illness, funeral, and related expenses.

6. **AUTHORITY OF THE TRUSTEE.** To enable the Trustee to achieve the purposes of this Trust, I grant to the Trustee the continuing, discretionary power to deal with any property of this trust as freely as I might in the handling of my own affairs. I direct that the Trustee shall have the maximum powers allowable to Trustees under the laws of the State where this Will is probated or any other State of competent jurisdiction, and that the Trustee shall serve without court supervision. To the extent permitted by the law of the State in which this Will is probated, I direct that my Trustee shall be permitted to serve without bond or other security.

WILL NOTARIZATION PROCEDURES

A. Notary, 3 witnesses and client must stay in the room until the notarization is complete

1. Check everyone's I.D. card.
2. Are you _____? (Read the person's name exactly as it appears on the will.)
3. Have you read your will?
4. Does it dispose of your property as you wish?
5. Are you voluntarily signing this will?
6. Is anyone forcing you to sign this will?
7. Witnesses, do the Testators and Testatrixes appear to be of sound mind and memory?

When everyone has completed signing all of the pages, make sure you, as the notary, check to make sure everyone has printed and signed in the proper spaces. Draw a diagonal line on the bottom of the last page of the will (the page before the first signature page) to ensure the client does not type in additions after the will has been notarized. After everyone has witnessed the wills, ask the following questions to all witnesses.

Do you solemnly swear that the Testator or Testatrix signed and executed the instrument as his or her Last Will and Testament and that he or she has signed willingly and that he or she executed it as his or her free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the Testator or Testatrix, signed the Will as witness and that to the best of his or her knowledge the Testator or Testatrix was at that time an adult, of sound mind and under no constraint or undue influence?

All witnesses must answer yes. After all of this is complete, you then notarize all of the wills. Things you should tell the client after notarizing the will:

1. Make sure you keep your will in a safe place.
2. Make sure you let someone else know you have a will.
3. If you have an earlier will, you should destroy it.
4. Be aware that if you keep your will in a safety deposit box it will be sealed upon your death and may delay the probate procedure.
5. The copy of the will is for your own personal use. Most people give the copy to their Executor. However, if the original is lost, your Executor may encounter problems trying to get the copy of the will probated without the original.
6. If circumstances change or for any reason you want to change your will, make an appointment to have a new will made. Do not make pen and ink changes to your will.

ADOPTIONS

1. _____ Interview client to determine whether this is a step- parent adoption or an adoption of a child who is not the child of either parent. Determine if avenues other than adoption are more desirable.

A. _____ Determine if the needs of the client may be satisfied by the appointment of a guardian rather than an adoption.

B. _____ If this is a step-parent adopting the child of his or her spouse, explain in detail the legal ramifications of the adoption and impact on legal obligations and rights of both adoptive parents and child.

C. _____ Separate counseling of the adoptive parent in the absence of the natural parent may be desirable in light of the obligation being undertaken.

2. _____ For non-family member or non step parent adoptions, take the following steps:

A. _____ Ascertain that the adoption is being handled through a reputable public or private agency. Counsel against adoptions from suspect sources.

B. _____ Advise thoroughly with regard to the consequences of the adoption with regard to the legal rights and obligations of the adoptive parents and child once the adoption is completed.

C. _____ Advise generally of the steps involving the process of adoption including any need for termination of natural parents rights. Explain the adoption process as set forth in the statute.

3. _____ It may be that an adoption will involve a minor or non adoptive parent who is/are not a citizen. Consultation with Immigration and Naturalization Service should be considered. Ask if the child is an American Indian. If so, the Tribe has a right under Federal Law to be notified of the proceedings and possibly be represented.

4. _____ If the client seeking advice about adoption is concerned for the welfare of an adult rather than a child, consult local law on conservators.

5. _____ See SECNAVINST 1754.3 on potential Government reimbursement of adoption expenses.

ADOPTION INFORMATION WORKSHEET

1. Name (First, middle, last)
2. Current address (complete address)
3. Current phone number:
4. Permanent address (if different from above)
5. Relationship to child (step-father, etc.)
6. Name (First, middle, last)
7. Current address (complete address)
8. Current phone number:
9. Permanent address (if different from above)
10. Relationship to child (natural mother, etc.)
11. Maiden name: (First, middle, last)
12. Name: (First, middle, last)
13. Age:
14. Address where currently residing. 14a. Since? (date)
15. Was the child brought into the state for the purpose of adoption?
16. Parent, guardian, etc., (first, middle, last) with whom the child currently resides:
 - a. Relationship to child:
 - b. Address: (if different from child's address)
17. Parent, guardian, etc., (first, middle, last) with whom the child currently resides:
 - a. Relationship to child:

- b. Address: (if different from child's address)
- 18. Child's name change request: (first, middle, last)
- 19. Full name(s) of natural mother and or father:
- 20. Current address: (complete address)
- 21. Current phone number:
- 22. Will he/she consent to adoption?
- 23. Has he/she waived his parental right to consent?
- 24. If he/she will not consent to the adoption and his whereabouts are unknown, please answer the following:
 - a. What was your last contact with natural father/mother?
 - b. Last known address: (complete address)
 - c. Last known phone number:
 - d. Last known employer:
 - e. Names and addresses of relatives who might know of his/her current address or phone number:
 - f. City, county, and state where he/she would most likely be living:
 - g. Name of newspapers for area listed in 24f:
 - h. Department of Motor Vehicle's address for the city and state he/she last had driver's license:
- 25. If either the adopting mother or father (circle one) were previously married to a natural parent of the child, please answer the following questions:
 - a. Date of marriage:
 - b. County and state of marriage:
 - c. Date of divorce:
 - d. County and state of divorce:

- e. Were any child custody arrangements made in the divorce decree? (If yes, please summarize the arrangements)

- f. Were any child support arrangements made in the divorce decree? (If yes, please state the general terms).

NLS0
Date

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Family Court
Juvenile Clerk's Office
Address

Re: Adoption of _____

Dear Sir/Madam:

I am currently assisting _____, U.S. Navy, and his wife, _____, in my capacity as a legal assistance attorney. _____ and _____ desire to adopt their _____, _____. To that end, I am forwarding the following documents:

- a. Petition of Adoption (1)
- b. Report(s) of Adoption (2 originals)
- c. Original Birth Certificate (1)
- d. Photocopy of Petitioner's Marriage License (1)
- e. Natural Mother's Consent to Adoption (1)
- f. Petitioner's Affidavit of Whereabouts Unknown (1)
- g. Natural Mother's Affidavit of Whereabouts Unknown (1)

I respectfully request that this matter be set down for hearing in _____ (place). If you should have any questions, please feel free to contact me at the letterhead address.

Sincerely,

Sydney Vichesse
LT, JAGC, U.S. Naval Reserve
Legal Assistance Attorney

A LEGAL ASSISTANCE ATTORNEY IS A LICENSED ATTORNEY
WHO ACTS SOLELY ON BEHALF OF AN INDIVIDUAL CLIENT
AND NOT THE UNITED STATES GOVERNMENT.

NONSUPPORT CHECKLIST

1. _____ Consult MILPERSMAN, article 6210120.3a.
2. _____ If member has not been notified by the client, draft a letter to member.
3. _____ If client has been contacted, or if member has failed to respond to our letter, then draft letter To command.
4. _____ If command has failed to respond to our letter within 20 calendar days, send a econd request.
5. _____ Send client copies of all correspondence.
6. _____ Client should contact the Examining Division of Family Allowance Activity. The Division will contact servicemembers and inform them that failure to support their dependents will result in the retroactive checkage of BAQ.

Examining Division of the Family Allowance Activity
Anthony J. Celebreeze Building
Cleveland, OH 44199-2087
(216) 522-5567

7. _____ If client has a court ordered award of support, the client can contact the Family Allowance Activity to start an involuntary allotment against the servicemember. The Legal Assistance Officer should NOT become involved in this matter.
8. _____ If client has no funds, she can be referred to Navy Relief, Red Cross, State Connecticut Department of Human Resources, etc.
9. _____ Refer client to civilian attorney or State Bureau of Child Support.
10. _____ Close file.

SUPPORT LETTER MEMBER

Ser LA/
(Date)

From: Lieutenant Ward Cleaver, JAGC, USNR,
To:

Subj: NONSUPPORT OF DEPENDENT(S)

Ref: (a) MILPERSMAN 6210120

1. On this date, your spouse, _____, requested legal assistance concerning what she states is your failure to render adequate and/or continuous financial support to her (and the children).
2. Your spouse states that you have not (provided financial support since (date))[complied with the terms of the (court order)(court decree)(separation agreement)][sent her sufficient funds to meet family expenses]. If she is correct, this is not in keeping with your regulatory or moral responsibilities for support of your dependent(s).
3. Reference (a) requires that you provide your dependents with an appropriate amount of financial support. In addition, that regulation specifies the responsibilities of commanders towards servicemembers who fail to meet their financial obligations to their dependents.
4. You are further advised that if you have received BAQ payments and have improperly withheld that amount from your spouse, those BAQ payments may, in the future, be withheld from your pay and allowances, and the amounts of BAQ improperly withheld by you in the past may be deducted from your pay and allowances.
5. As a servicemember, you are entitled to help from a legal assistance officer. I strongly recommend that you seek advice from the Legal Assistance Office or a civilian attorney.
6. I hope this matter can be resolved quickly and amicably. Please respond to this letter, or have your attorney respond to this letter, within five days of receipt.

W. CLEAVER

Copy to:
(Client's Name)

SEPARATION AGREEMENT CLIENT INFORMATION QUESTIONNAIRE

I. INSTRUCTIONS. Answer all of the following questions carefully, completely and legibly. Based upon the information provided, your attorney will assess your marital situation and render appropriate legal advice. If a question is inapplicable, mark it "NA" and move on to the next one; if additional space is required attach additional sheets. If you have questions, write them down for discussion at your next appointment.

Your legal assistance attorney represents only you in this matter. It is his or her duty to ensure that you are fully informed about both the substantive and procedural law relating to your separation agreement and that you receive timely and proper legal advice; however, this advice is based on complete and accurate information from you. Although much of the information requested is very personal you may be assured that it will be held in the strictest of confidence and that it will not be disclosed to anyone under any circumstances.

sII. BIOGRAPHICAL DATA

Your Full Name:

SSN:

Rank and pay grade:

Branch of Service:

Pay entry base date:

Date of birth:

Occupation:

Military address:

Current mailing address:

Work phone:

Home phone:

State of legal residence:

Place of birth:

Are you employed (by other than the military)? _____ If yes, state:

Name of employer:

Job title:

Nature of job:

Employed since:

Gross salary:

Describe your health:

Under treatment for:

Were you previously married?

If so, when and where divorced:

Are you receiving or paying any money for the support of children of a former marriage or illegitimate children?

If so, number of children: Amount:

Any arrearages due for support? If yes, amount:

Alimony to former spouse: per: until:

Are any arrearages due for alimony? If yes, amount:

Spouse's Full Name: SSN:

Rank and pay grade: Branch of service

Pay entry base date: Date of birth:

Occupation:

Military address:

Current mailing address:

Work phone: Home phone:

State of legal residence: Place of birth:

Is spouse employed (by other than the military)? If yes, state:

Name of employer:

Job title: Nature of job:

Employed since: Gross salary:

Describe spouse's health:

Under treatment for:

Was spouse previously married? If so, when and where divorced?

Is spouse receiving or paying any money for the support of children of a former marriage or children born out of wedlock?

If so, number of children: Amount:

Are any arrearages due for support? If yes, amount:

Alimony to former spouse: per: until:

Any arrearages due for alimony? If yes, amount:

III. MARRIAGE DATA

Date of marriage:

Location (city and state):

Date of Separation:

If not already separated, expected date of separation:

IV. CHILDREN

List all children of this marriage (natural or adopted):

FULL NAME	BIRTHDATE
LIVING WITH	

Physical or emotional disabilities of children:

Are you (or your wife) pregnant or could you (or your wife) be pregnant?

List all children of any prior marriage by you or your spouse:

FULL NAME	BIRTHDATE	PARENT (H/W)
LIVING WITH		

Who has legal custody of these children?

V. PERSONAL PROPERTY: List all property wherever located ([United States, Japan, etc.):

A. Automobiles, Trucks, Motorcycles, Boats, etc.

Vehicle 1: (Type of Vehicle):

Serial #: Year: Make: Model:

Titled in name of:

Is there a balance owed?

If so, to who?:

Current balance: Monthly payment:

Who gets the vehicle?

Who makes the payment?

Vehicle 2: (Type of Vehicle):

Serial #: Year: Make: Model:

Titled in name of:

Is there a balance owed?

If so, to who?:

Current balance: Monthly payment:

Who gets the vehicle?

Who makes the payment?

[Add additional vehicles on separate sheets.]

Are any of the above vehicles to be sold?

If so, which one(s)? Who will sell?

Current value: Selling for:

Disposition of proceeds:

B. Household Goods

Do you have furniture or household goods in Japan?

If so, state:

Have you mutually agreed upon its division?

Has it already been divided?

Are you satisfied with the division?

Who gets it? Husband Wife Split

If the property is to be split, state:

When will the split occur?

How is it to be divided?

Do you have furniture or household goods in nontemporary storage? If so, state:

Where (city and state):

Name of storage company:

Have you mutually agreed upon its division?

Are you satisfied with the division?

Who gets it? Husband Wife Split

If the property is to be split, state:

When will the split occur?

How is it to be divided?

BRING A COPY OF THE INVENTORY TO YOUR APPOINTMENT

If your spouse is in the United States, does he or she have furniture or household goods in his or her possession?

Have you mutually agreed upon its division?

Are you satisfied with the division?

Where is it located (city and state)?

What will you receive?

When?

C. Bank Accounts

Account 1 (Type of account, checking or savings):

Name of institution:

Location:

In whose name? Husband

Wife

Joint

Account #:

Balance:

If joint, who gets the account?

What happens to the proceeds?

Account 2 (Type of account, checking or savings):

Name of institution:

Location:

In whose name? Husband

Wife

Joint

Account #:

Balance:

If joint, who gets the account?

What happens to the proceeds?

D. Stocks, Bonds, and other Financial Assets

Own U.S. Savings Bonds? If yes, state:

Total face value:

Owner:

Beneficiary:

To be retained by? Husband Wife Split

If bonds are to be split, describe how:

Own stocks? If yes, state:

Corporation	# Shares	Par Value	Reg Owner
-------------	----------	-----------	-----------

To be retained by?	Husband	Wife	Split
--------------------	---------	------	-------

If stocks are to be split, describe how:

BRING STOCK CERTIFICATES TO YOUR APPOINTMENT

Have an individual retirement account (IRA)?

Does your spouse?

If so, state:

Institution	Account #	Amount on Deposit
-------------	-----------	-------------------

Yours:

Spouse's:

Disposition of IRAs?

BRING IRA ACCOUNT STATEMENT TO YOUR APPOINTMENT

List all other financial assets by name, account #, present value, and account holder. e.g. mutual funds, Keough plans, investment accounts, certificates of deposit, notes, bonds, etc.

BRING COPY OF ACCOUNT STATEMENTS TO YOUR APPOINTMENT

Do you or your spouse have any money or property held or owed by others? If so, give details:

Was any part of your marital estate received by you or your spouse as the result of inheritance, gift, or damages resulting from personal injury claims? If yes, state by whom received, from whom, nature and date received:

Are you, your spouse, or both of you beneficiaries under any estate now in probate? If yes, state which party, whose estate, and approximate amount involved:

VI. REAL PROPERTY

A. Marital Home

Do you own a home?

Address:

Date purchased: Price:

Titled in name of:

Mortgage in name of: and held by:

with approximate balance of: as of:

Monthly payments:

Second mortgage, if any (give same details):

BRING COPY OF DEED AND MORTGAGE TO YOUR APPOINTMENT

B. Other Real Estate

Do you own any other real estate (e.g., house, condo, undeveloped land, timeshare, etc)? If yes, state:

Address:

Date purchased: Price:

Titled in name of:

Mortgage in name of: and held by:

with approximate balance of: as of:

Monthly payments:

Second mortgage, if any (give same details):

BRING COPY OF DEED AND MORTGAGE TO YOUR APPOINTMENT

VII. LIFE INSURANCE

Do you have a SGLI policy? Amount:

Current beneficiary:

Does your spouse? Amount:

Current beneficiary:

Do you or your spouse have any privately obtained insurance policies?

Type of insurance: Term Whole Life Universal Life

Policy of: with:

On life of: for: beneficiary:

Type of insurance: Term Whole Life Universal Life

Policy of: with:

On life of: for: beneficiary:

Do you or your spouse have any life insurance through an employer or labor union (other than SGLI)? If so, describe in same terms as above, if possible:

VIII. CURRENT DEBTS: List all outstanding obligations of the parties (individual and joint debts) regardless of amount, except car payments:

Creditor	Account #	Balance	Who will pay? H/W
----------	-----------	---------	-------------------

IX. FAMILY CONSIDERATIONS

If you have children, who will receive custody?

Husband	Wife	Split
---------	------	-------

If split, describe:

What do you consider as a fair (not what you want) amount of support based upon the assets and earnings of the parties?

SUPPORT FOR WIFE:

SUPPORT FOR CHILDREN:

Signature of client Date

Reread the entire questionnaire and be sure that you have included everything that is asked of you. After you have completed all applicable questions and secured the necessary documents, call the Legal Assistance Office for an appointment. Our phone number is:

**SEPARATION AGREEMENT
CLIENT INTERVIEW FORM****Client:** _____ **Date:** _____

1. Is spouse in Japan? Yes/No
2. Accompanied tour? Yes/No
3. If accompanied, has service member spouse requested early return of dependents? Yes/No. If yes, when? _____
4. **CHILD SUPPORT**
 - a. Amount: _____ per month per child for a total of _____ per month
 - b. Commencing _____
 - c. Paid by: allotment, personal check or money order?
 - d. What state will custodial spouse be residing in? _____
 - e. Will child support continue beyond 18 if child attends college? Yes/No
 - f. Discuss tax consequences (i.e. non deductible by payor or includible by payee)
5. **VISITATION**
 - a. "Reasonable" or specific? If specific, describe:
 - b. How many weeks during the summer? 2, 4, 6, or 8?
 - c. Notice for normal visitation? 24, 48, or 72 hours?
 - d. Notice for summer visitations? 4, 6, or 8 weeks?
 - e. Who pays for the costs of visitation? H or W?
6. **SPOUSAL SUPPORT**

- a. Yes or no? If no, discuss the ramifications of a waiver. Consider a minimal amount of support (e.g., \$5/mo) for a limited period in order to keep this provision executory.
- b. Amount: _____ per month
- c. Commencing _____
- d. Terminating on: (1) divorce. (2) remarriage or cohabitation of wife, or (3) specific date _____
- e. Paid by: allotment, personal check or money order?
- f. Discuss tax consequences (i.e., normally deductible by payor and includible by payee, but it doesn't have to be). Deductible by payor spouse? Yes/No

7. LIFE INSURANCE

- a. Service member spouse to maintain SGLI? Yes/No
- b. Beneficiary: (1) child(ren) until emancipation, or (2) wife for as long as parties remain married?
- c. If service member discharged, must he/she convert SGLI to term policy in principal amount? Yes/No
- d. Additional policies? Yes/No
- e. If divorced, can owner of additional policy do whatever he/she wants with it? Yes/No

8. MILITARY RETIREMENT

- a. Waive? Court to retain jurisdiction? Divide?
- b. If divided, describe monthly % or dollar amount to be received:

9. INCOME TAX

- a. Option 1: Separate returns
Tax liability responsibility of filing party
Refund - property of filing party

- b. Option 2: Joint returns (for as long as entitled)
Tax liability: each pays proportionate share
Refund: (1) divided proportionately, (2) divided equally, or (3) sole property of H or W?
- c. Option 3: Joint return this year, separate all others; For joint return year: Tax liability - each pays proportionate share; Refund: (1) divided proportionately, (2) divided equally, or (3) sole property of H or W?

For separate return years: Tax liability: responsibility of filing party;
Refund: property of filing party

- d. Who claims dependent exemptions for children? H, W, or split? If split, describe: _____
 - e. If joint return, who prepares it? H or W?
10. **SUBSEQUENT DIVORCE:** Who pays for attorney fees and court costs? H, W, or each pays their own?

11. **GOVERNING LAW**

- a. Who is filing for divorce? H or W?
- b. Where? _____

12. **SEPARATE COUNSEL**

- a. Other spouse represented by counsel? Yes/No
- b. If yes, who? _____

13. **MISCELLANEOUS INFORMATION**

- a. What about relocation expenses for returning spouse? e.g., security deposits; electricity, gas and water deposits; car, insurance and gas; and, day care expenses. Is this required? Yes/No. If yes, how much? _____ Paid when? _____
- b. Do you have a will? Yes/No. Should it be reviewed?
- c. Are there joint bank accounts to which your spouse has access? Yes/No

- d. Does your spouse have credit cards for which you are responsible?
Yes/No. If yes, specify:
- e. Have you safeguarded your passport (and your children's) and other
valuable documents from your spouse? Yes/No

14. NOTES:

SPOUSE TAX EXEMPTION LETTER

Tax Collector and Tax Assessor

Town of _____

To Whom It May Concern:

My spouse is on active duty in the United States Navy and is currently deployed. Because of my spouse's status as a member of the Armed Forces, he/she is exempt from personal property taxation by the State of Connecticut and its political subdivisions in accordance with the provisions of section 514 of the Soldiers' and Sailor's' Civil Relief Act (codified at 50 U.S.C., App. 501 et seq).

On _____ my spouse and I moved to the state of Connecticut and currently reside at _____. Our presence in Connecticut is solely the result of official military orders.

My spouse's permanent residence is the State of _____ and we intend to return there upon my spouse's separation or retirement from the Armed Forces.

When my spouse returns from deployment, he/she will provide you with an affidavit setting forth the above information. In the interim, please annotate your records accordingly and cancel your collection efforts.

Thank you for your attention to this matter.

SSCRA AFFIDAVIT**AFFIDAVIT**

STATE OF CONNECTICUT
COUNTY OF NEW LONDON

I, _____ being first sworn do say the following:

To the Clerk of _____.

I am presently on active duty in the United States Navy. I am attached to the USS _____ which is based in Groton, Connecticut. I will be unavailable to appear in court due to my military obligations for approximately three months.

In accordance with the Soldiers' and Sailors' Civil Relief Act 50 App USC 510 et seq., I request that no actions be taken in court in the case of _____, case number _____.

I will make contact with you through my attorney, _____, as soon as I am available to answer in this case.

CLIENT

STATE OF CONNECTICUT
COUNTY OF NEW LONDON

Subscribed and sworn to before me this ____ day of _____, 1991.

NOTARY PUBLIC

Civil Action, File Number_____

(name) Plaintiff)V.) Motion to Vacate Judgment
) and Execution_____
(name) Defendant)Plaintiff's Attorney: _____
(name)

The defendant, pursuant to Rhode Island General Laws S. 10-16-11,
moves the Court to vacate the default judgment entered against defendant on _____

(date)

and the execution of said judgement because plaintiff misrepresented to the court that defendant was not a member in the military service of the United States as defined by Article I of the "Soldier's and Sailor's Civil Relief Act of 1940" (50 U.S.C. App. S. 501) and, that as a result of plaintiff's misrepresentation, defendant was prejudiced by reason of his military service in making his defense.

1. Defendant is now, and was at the time of commencement of the action, and the entry of judgment and execution, on active duty in the United States Navy. Exhibit I.

2. Plaintiff misrepresented to the court that defendant was not in the military service. Exhibit 2.

3. Plaintiff or plaintiff's attorney, knew or should have known, prior to entry of judgment that defendant was in the military service. Exhibit 3.

4. Defendant was at sea with his ship _____ at the
(ship's name & hull #)
commencement of the action and judgment. Exhibit 4

5. Defendant had no notice of the judgment until service of the execution in _____. Exhibit 5.
(date)

6. Defendant has a legal defense to the Action, in that plaintiff performed unauthorized repairs.

A copy of this motion was mailed to plaintiff's attorney by certified mail, return receipt requested on _____.
(date)

5801
NLSO
date

(name and address of judge)

Re: Docket No. _____

Your Honor,

I am assisting _____ in my capacity as legal
(rank/name of client)
assistance attorney.

This sailor will not be able to attend the scheduled hearing on

(date)

due to military commitments of his ship. The sailor will be able to attend a
hearing during _____. It is

(date(s))

requested that the hearing be continued until that time. Enclosed is an Affidavit
to this effect by _____

Please do not construe this letter as an appearance by _____
(client)

or an answer in the action or a waiver of the protections under the Soldiers and
Sailors Civil Relief Act. If there are any questions, please call me at (401) 841-
3766.

Your cooperation is greatly appreciated.

Sincerely,

ATTORNEY'S NAME
RANK, JAGC, U.S. Navy
Legal Assistance Officer

Encl:

(1) Affidavit of _____

Copy to:

(client)

A LEGAL ASSISTANCE ATTORNEY IS A LICENSED ATTORNEY
WHO ACTS SOLELY ON BEHALF OF AN INDIVIDUAL CLIENT
AND NOT THE UNITED STATES GOVERNMENT.

5801
NLSO
date

(name and address of creditor)

Re: _____
(subject matter)

Dear Sir or Madam:

_____, a member of the _____,
(rate/rank & full name of client) (Navy/Marine Corps) has sought
legal assistance regarding the above-referenced debt incurred before _____ enlisted
in the _____.

(he/she) (Navy/Marine Corps) (client)
has no intention of avoiding his/her financial obligations, but has requested to
exercise his/her rights under the Soldiers and Sailors' Civil Relief Act of 1940, as
amended.

_____ has been advised that Section 531 of the
(client) Soldiers' and Sailors' Civil Relief Act of 1940, as amended, prohibits
rescission or termination of a contract for the purchase of real or personal
property, or repossession of the property, for nonpayment of any installment due
or any other breach of contract, absent a court order. _____ has

(client)
also been advised that the Act prohibits a court from entering a default order
against him/her. (50 U.S.C. App., Section 520).

_____ has been further advised that the knowing violation of this provision is
a Federal crime punishable by imprisonment for up to one year and a fine and
that guarantors, sureties and others are secondarily liable by Section 513. _____
is aware that the rate of interest chargeable on such debts is limited by
Section 526 and that the Act further protects against default judgments on such
obligations.

_____ understands that he/she should notify you
(client)
immediately upon discharge from the service in order to establish repayment
terms. On behalf of my client, your patience and cooperation is sincerely

appreciated. If our office can be of any assistance to you, please feel free to contact me at the above number.

Sincerely,

MILITARY CONSUMER COMPLAINT FORM

I desire to submit a complaint against a business which I believe has treated me unfairly. I understand that the sole purpose of this complaint is to provide information for possible use by the Armed Forces Disciplinary Control Board in determining whether the business complained against should be placed off limits to military personnel. I authorize the Armed Forces Disciplinary Control Board to notify the business of my complaint, and to release any or all of the following information to the business during the course of its inquiry into my complaint.

Name: _____

Command: _____

Rank: ____ Branch of Service: ____ Work Phone: _____

My complaint is against: _____
(Name & address of business)

The general nature of my complaint is:

- ☐ Insurance
- ☐ Auto Repair
- ☐ Auto Rental
- ☐ Auto Purchase
- ☐ Purchase of Other Goods (Specify: _____)
- ☐ Other

I believe I have been treated unfairly for the following reasons, and I have attached supporting documentation:

(Use the back if you need more room.)

Signature: _____ Date Signed: _____

Submit completed forms to: Commanding Officer, Naval Legal Service Office, Attn: Head Legal Assistance Department, Box 124, Pearl Harbor, HI 96860-5110

5801
NLSO
date

(name and address of creditor)

Re: _____
(subject matter)

Dear _____:
(name of creditor)

A review of your records for the above account indicates a
failure by _____ to fully comply with the Federal
(creditor)
Truth in Lending Act (15 U.S.C., Sec. 1601-1613, 1631-41, 1671-
77)[1982]. Please be advised that the onus of proving compliance
with the above Act is on _____.
(creditor)

Sincerely,

ATTORNEY'S NAME
RANK, JAGC, U.S. Naval Reserve
Legal Assistance Attorney

Copy to:
(client)

5801
NLSO
date

(name and address of creditor)

Re: _____

(subject matter)

Dear _____ :
(name of creditor)

_____ Civil Code _____ provides that debt collectors
(name of state) (code)
may contact the debtor's employer regarding a consumer debt only if the debtor
has consented, in writing, to such communication or the communication is made
solely to verify employment, locate the debtor, or to effect garnishment of the
debtor's wages or, in the case of a medical debt, to verify the existence of medical
insurance.

Therefore, writing to _____ or anyone else in the U.S.
(command)

Navy/Marine Corps, in an attempt to obtain assistance in collection of an alleged
debt of _____ is a violation of _____
(rank/name of client) (state)
state law, _____ Civil Code _____. For this reason, your letter alleging
indebtedness of _____ is returned.
(client)

Additionally, the Secretary of Defense prohibits the command from taking action
on allegations of indebtedness unless the alleged creditor can show that the
disclosure requirements of 15 U.S.C. 1601 and Regulation Z have been met and
the standards of fairness have been applied.

Sincerely,

ATTORNEY'S NAME
RANK, JAGC, U.S. Naval Reserve
Legal Assistance Attorney

Copy to:

(client)

NLSO
date

(name and address of creditor)

Re: _____
(subject matter)Account No.: _____
Balance: _____
(dollar amount)

Dear _____:

I am currently assisting _____, U.S. Navy, in my
(rank/rate, client)
capacity as a legal assistance attorney. My client is in receipt of your notice of
deficiency dated _____.

Please be advised that my client cannot satisfy the \$ _____
balance due in a single payment. At this time, _____
(client)

can make payments of \$ _____ per month; this amount is subject to some
negotiation. I believe that acceptance of this offer would be mutually beneficial to
you and _____

(client)
in that my client's assets are negligible at best and his wages would not be subject
to garnishment or attachment for purposes of satisfying a civil judgment.

Therefore, I respectfully request that the aforementioned offer of payment be
considered by you, and that all further correspondence on this matter be
forwarded to me at the letterhead address. Also, please forward all documentation
attendant to the repossession and resale of the vehicle to this command for my
review.

Thank you for your anticipated cooperation in this matter.

Sincerely,

ATTORNEY'S NAME
RANK, JAGC, U.S. Navy
Legal Assistance Attorney

Copy to:
(client)

5801
NLSO
date

(name and address of attorney)

Re : _____
(subject matter)

Dear Attorney _____:

I am currently assisting _____, U.S Navy, and
(rank/rate, name of client)

his wife, _____ in my capacity as a legal assistance
(wife's name)

attorney. Please be advised that my clients desire to satisfy the debt owed to _____
_____ and, to that end,

(creditor)

request that your client accept a payment plan in lieu of litigation.

I respectfully request that you confer with your client and inform me as to
whether _____ would be amenable to
(creditor)

such an arrangement. In the meantime, please forward any and all future
correspondence on this matter to my attention.

Thank you for your anticipated cooperation. I look forward to hearing from you in
the near future.

Sincerely,

ATTORNEY'S NAME
RANK, JAGC, U.S. Navy
Legal Assistance Attorney

Copy to:
(client)

BILL OF SALE

Make of Merchandise _____

For the Sum of _____

and/or any other valuable consideration, the receipt and
sufficiency of which is hereby acknowledged, I did sell, deliver
and transfer to _____ whose address is

on the ____ day of ____, 19 __, all my right, title and interest
in and to the above-described property.

I certify under penalty of perjury that I as lawful owner of said

have the right to sell same, that I warrant and will defend the
title to the _____

against the claims and demands of all persons whomsoever, and that said

is free from all liens and encumbrances, except those listed below.

Lien: _____

Lien: _____

STATE OF HAWAII
CITY AND COUNTY OF HONOLULU

On this ____ day of _____, 199__, before me
personally appeared _____, known to me to be the person(s) described
in and who executed the same as _____ free act and deed.

Notary Public, State of Hawaii
My commission expires:

STANDARD MILITARY CLAUSE FOR CANCELLING LEASE

MILITARY TENANT: The tenant is a member of the United States Armed Forces, and may terminate this lease on thirty (30) days written notice to the landlord in any of the following events:

1. If the tenant receives military orders to transfer to a duty station, the main gate of which is more than twenty (20) miles from the main gate of his former duty station.
2. If the tenant receives military orders requiring him to move into government quarters or the tenant voluntarily moves into government quarters.
3. If the tenant retires, or is released from active duty.
4. If the tenant has leased the property prior to arrival in the area, and his orders are changed to a different area prior to occupancy of the property.

The written notice becomes effective thirty (30) days after the date of service of notice upon the landlord, or such time as dictated by the military orders. If the date of written notice falls between days on which rent becomes due, the notice becomes effective on the first day of the next rental period, provided that the tenant is liable for the proportionate part of the rent which would be due but for the termination. If the tenant terminates the lease under this military clause, and is in compliance with all other terms of the lease, the landlord will refund to the tenant, within fourteen (14) days after the tenant vacates, any and all security and/or damage deposit held.

Dated: _____

Tenant

Tenant

Dated: _____

Landlord

POWER OF ATTORNEY WORKSHEET

PLEASE READ PRIOR TO GIVING A POWER OF ATTORNEY

A power of attorney (POA) is a legal document that allows someone to act on your behalf. When that person (called the "grantee") performs an act using your POA, he or she can obligate you (called the ("grantor") legally just as if you had performed the act yourself.

There are two kinds of POAs, general and special. The general POA allows the grantee to do a wide variety of things on your behalf. Because the general POA gives the grantee such broad authority, it can be easily abused. Never give a general POA to someone you do not trust completely. A special POA, on the other hand, is usually much more limited. It allows the grantee to do only certain things on your behalf. If you know what you want your grantee to do on your behalf, we **STRONGLY** recommend a special POA. Sometimes 2 or 3 special POAs, each for a different purpose, work better than a general POA.

No one has to accept a POA. Although the Navy will accept one for most purposes, many businesses, banks, and real estate companies will not. (POAs are frequently not accepted for real estate transactions.) Check with your bank or real estate agent and see what their policies are. Sometimes it will help if you, the grantor, talk to them in advance and ask them to honor the POA.

Once a POA has been granted, it is difficult to take it back or revoke it before the expiration date. Although you can tell the grantee to stop using it, that will not protect you from a third party who accepts the POA without knowing that you have revoked it. We recommend you set an expiration date that is not longer than it needs to be. At any rate, we will not make a general POA good for more than 2 years, or 1 year for E-3 and below and their dependents.

FILL OUT THE BELOW INFORMATION
SPELL OUT ALL NAMES (NO INITIALS)
PLEASE PRINT CLEARLY ALL INFORMATION

5. Name _____
(First) (Middle) (Last)
6. Address _____
(Street Name & #) (City) (State)
7. Name of Grantee _____
(First) (Middle) (Last)
(Relationship)

8. Address of Grantee _____
(Street Name & #) (City) (State)
9. Expiration Date _____
10. Type of Power of Attorney: Special General (Circle One)
11. Types of Special Powers of Attorney
- a. Circle the applicable item and provide the required information in the remarks section.
- (1) Ship/Receive Household Goods
 - (2) Ship/Receive Auto (Provide make, model, license #, state where licensed, vehicle ID #)
 - (3) Banking (Provide name and address of bank, account
 - (4) Child Care (Provide complete name of child(ren))
 - (5) General Auto (Provide same as in 2 above)
 - (6) Other: _____
12. Remarks:

WORK PHONE #: _____ HOME PHONE #: _____

DATE: _____ RATE/RANK: _____

COMMAND: _____

STATEMENT OF UNDERSTANDING FOR GENERAL POA

I understand that, once granted, it is almost impossible to revoke a general power of attorney until its expiration date. I also understand that no bank, agency, or business is obligated to accept a general power of attorney, and many will not. Understanding all of this, I still wish to grant a general power of attorney.

SIGNATURE

POWER OF ATTORNEY WORKSHEET

Attny: _____

of POAs: _____

Civ. Not.: _____

Date: _____

PLEASE FILL OUT THE INFORMATION BELOW - PLEASE PRINTName: _____ Rate/Rank: _____ SSN: _____
(Last/First/MI)Local Address: _____ Home Phone: _____

Organization/Unit: _____ Duty Phone: _____

City/State of **Legal residence**: _____ (Where do you pay taxes/vote?)**WHO DO YOU WANT TO GIVE THE POWER(S) OF ATTORNEY TO? --**
(minors, persons of unsound mind, and persons deprived of civil rights should not be given a power of attorney.)Name: _____ Relationship: _____
Last/First/MI

Address: _____

Name: _____ Relationship: _____
Last/First/MI

Address: _____

EXPIRATION DATE -- Until what date do you want this power of attorney to be in effect? (Recommended maximum of 1 year) -- Date: _____**PLEASE ANSWER THE FOLLOWING QUESTION -- ONLY -- AS IT APPLIES TO A GENERAL POWER OF ATTORNEY.** If you are an active duty

servicemember and you become "missing in action" (MIA) or a "prisoner of war" (POW), do you want this power of Attorney to continue until your MIA or POW status is terminated?

Yes _____ No _____

CHECK AND COMPLETE - - ONLY THE ITEMS YOU NEED

_____ **GENERAL POWER OF ATTORNEY** (Please read the information sheet.)

_____ **GOVERNMENT CHECK CASHING** (This power of attorney is used for the collection of checks drawn on the United States Treasury. **THIS POWER OF ATTORNEY IS NOT NECESSARY IF YOU HAVE DIRECT DEPOSIT.**)

_____ **INCOME TAX RETURNS** (A special power of attorney is required to mail a tax refund check to someone other than the taxpayer or to allow someone other than the taxpayer to endorse the check or sign the tax return.)

_____ **FILE FEDERAL TAX RETURN**

_____ **FILE STATE TAX RETURN**

FOR WHICH TAX YEAR? _____

_____ **TO CASH TAX REFUND CHECKS**

_____ **AUTOMOBILES** (Gives someone your permission to drive, insure, sell, or register your automobile.) **CHECK THE ITEM(S) YOU WANT TO AUTHORIZE YOUR AGENT TO DO.**

___ **DRIVE** ___ **SELL** ___ **REGISTER** ___ **INSURE** ___ **ALL OF THESE**

Information about the vehicle:

YEAR _____ **MAKE** _____ **MODEL** _____
STATE IN WHICH REGISTERED ___ **LICENSE NO.** _____ **VIN** _____

_____ **REAL ESTATE** (If you want your agent to sell or buy real estate, you **MUST** provide a **COMPLETE LEGAL DESCRIPTION** of the property concerned.)

WHAT DO YOU WANT YOUR AGENT TO DO WITH THE REAL ESTATE PROPERTY?

_____ **BUY** _____ **SELL** (copy of legal description is attached)

_____ **LEASE/MANAGE**

Address: _____

_____ **OTHER** (Please state)

____ **CHILDREN** (A special power of attorney known as IN LOCO PARENTIS allows your agent to do any and all parental acts, i.e., discipline, maintenance, arbitration of disputes, enrollment in school and sports, and medical authorization. There is also a special power of attorney to allow your agent to authorize medical care. If you desire one or both of these, please so indicate, and provide the name(s) and date(s) of birth of the children. THIS POWER OF ATTORNEY IS NOT NECESSARY IF YOUR AGENT IS THE NATURAL MOTHER OR FATHER OF THE CHILD!)

____ IN LOCO PARENTIS ____ MEDICAL CARE ONLY

FULL NAME: _____ DOB: _____

FULL NAME: _____ DOB: _____

FULL NAME: _____ DOB: _____

____ **SHIPMENT OF HOUSEHOLD GOODS -- VEHICLES** (Allows your agent to contact the traffic management office and fill out all forms necessary to set up the transfer of your household goods or vehicle.) THE GOVERNMENT WILL ONLY PAY TO HAVE YOUR HOUSEHOLD GOODS SHIPPED WHEN YOU PCS!

FROM - CITY/STATE _____

TO - CITY/STATE _____

____ **OTHER** -- (Indicate in the space provided, what, IF ANY, other powers of attorney you need/require.)

GENERAL POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS;

That I, _____, a legal resident of the State of _____, and anticipating that a power of attorney may be useful in certain circumstances have made, and have appointed _____ my true and lawful attorney to act in, manage, and conduct all my estate and family affairs and for that purpose for me, in my name, place, and stead, for my use and benefit, and is my act and deed to do and execute, or to concur with persons jointly interested with myself therein, the doing or executing of all or any of the following acts, deeds, and things, that is to say:

1. To buy, receive, lease, accept, or otherwise acquire; to sell, convey, mortgage, hypothecate, pledge, quit-claim or otherwise encumber or dispose of; or to contract or agree for the acquisitions disposal or encumbrance of any real or personal property whatsoever or any custody possession, interest or right which I may have therein upon such terms as my said attorney shall think proper.
2. To take, hold, possess, invest, lease, or let or otherwise manage any or all of my property by all lawful means; and to maintain, protect, preserve, insure, remove, store, transport, repair, modify, or improve the same or any part thereof.
3. To buy, sell, exchange, lease for rent, register, re-register, mortgage, encumber, borrow upon, take out licenses in respect to, insure, collect insurance upon and otherwise deal with any automobile or automobiles, or any other personal or real property, in which I may have any interest, right, or property, or of which I may be the record owner.
4. To make, do, and transact, all and every kind of business of any nature of kind whatsoever, and including the receipt, recovery, collection, payment, compromise, settlement, and adjustment of all accounts, taxes, and obligations which may now or hereafter be due, owing or payable by me, or to me.
5. To make, endorse, accept, receive, sign, seal, execute, acknowledge and deliver deeds, assignments, agreements, certificates, hypothecations, checks, notes, bonds, vouchers, receipts and any other instruments in writing of whatever kind or nature.

NAME _____
RANK _____
U.S. MARINE CORPS

1 of 4

6. To deposit, withdraw and cash, for any purpose, in or from any bank, building and loan association, trust company or any other financial institutions, including U. S. Postal Savings, any funds, checks, negotiable papers or other credits which may come into my said attorney's hands, or which I now or hereafter may have on deposit or be entitled to, and to endorse, cash, and receive the proceeds of any or all checks, vouchers, or other orders for money; to have access for all purposes in any safety-deposit boxes or vaults rented in my name, or in the names of any other person or persons and myself, with full power to use the same for safekeeping and securities, or from time to time, all or any part of the contents of any such box or vault; and to act as my attorney or proxy in respect to any stocks, shares, bonds or other instruments, rights, or interest which I may now or hereafter hold.

7. To execute vouchers on my behalf for any and all allowances and reimbursements properly payable to me by the United States, including, but not limited to, allowances and reimbursements for transportation of dependents, for shipment of household effects authorized by law or Navy or other regulation; and to receive, endorse and collect the proceeds of checks payable to the order of the undersigned, drawn on the Treasurer of the United States for whatever account, and to execute in the name of and in behalf of the undersigned, all bonds, indemnities, applications or other documents which may be required by law or regulation to secure the issuance of duplicates of such checks and to give full discharge for same.

8. To take possession and order the removal and shipment of any of my property from any post, warehouse, depot, dock, or other place of storage or safekeeping, governmental or private, and to execute and deliver any release, voucher, receipt, certificate, shipping ticket, or instrument necessary or convenient for such purpose.

9. To institute, prosecute, defend, compromise, arbitrate and dispose of legal, equitable, or administrative hearings, actions, suits, attachments, arrests, distresses, or other proceedings, or otherwise engage in litigation in connection with any of the powers granted in this power of attorney.

10. To act as my attorney-in-fact or proxy in respect to any policy of insurance on my life, and in that capacity to exercise any right, privilege, or option which I may have thereunder or pertaining thereto, excluding, however, the right to change the beneficiary or the right to change the method of payment of the insurance proceeds as distinguished from a surrender of the policy for loan, conversion, or other purposes as provided therein.

NAME _____
RANK _____
U.S. MARINE CORPS

11. To engage and dismiss agents, counsel and employees, and to appoint and remove at pleasure any substitute for, or agent of, my said attorney, in respect to all or any matter or things herein-mentioned, and upon such terms as my attorney shall think fit.

12. To borrow money and execute any instrument evidencing indebtedness incurred on my behalf, and this authority is intended to include power to exercise on my behalf and in my name any rights or privileges which I may have under the Soldiers and Sailors Civil Relief Act of 1940, as amended and extended, and under the G. I. Bill of Rights Act of 1940, as amended and extended, and to extend and renew the same, as well as any indebtedness heretofore incurred by me, and for which I am in any manner liable.

13. To execute requests for payments on my behalf, on any United States Savings Bond registered in my name as owner or co-owner, and to receive, endorse, and collect proceeds of checks payable to my order, drawn on the Treasurer of the United States, in payment of the redemption value of, or in the interest on, any United States Bonds registered in my name as owner or co-owner.

GIVING AND GRANTING unto my said attorney full power and authority to do and perform all and every act, deed, matter, and thing whatsoever in, and about my estate, property and affairs as fully and effectually to all intents and purposes as I might or could do in my own proper person, if personally present.

The above-specified shall lawfully do or cause to be done by virtue of these presents, and I do hereby declare that any act or thing lawfully done hereunder by my personal representatives and assigns, whether the same shall have been done before or after by death, or other revocation of this instrument, unless and until reliable intelligence or notice therefore shall have been reported or listed either officially or otherwise as missing, as that phrase is used in Military parlance as defined in Title 37, United States Code, Section 551, it being the intendment hereof that such status designation shall not bar my attorney from fully and completely exercising the powers granted by this instrument, and that such report of missing shall neither constitute or be interpreted as constituting notice of my death nor operate to revoke this instrument.

This power of attorney shall not be affected by disability, incompetence, or incapacity of the principal.

NAME _____
RANK _____
U.S. MARINE CORPS

page 3 of 4

The terms "estate", "affairs", and "property", as used herein shall include, at all times and places and under all conditions, real, personal and mixed property of every kind and description whatsoever, and wheresoever, situated, and all buildings, structures, improvements, fixtures, vehicles, appliances, accessories, furnishings, equipment, choses in action, equities, permits, priorities, rations, quotes, rights of way, mineral and all rights, easements, licenses, future interests, reversions, remainders, and all other kinds of property or property right whatsoever, and every right, claim, demand, or action therein, and thereunto, appertaining and whether said property rights be tangible or intangible, jointly or severally owned, now or hereinafter acquired.

The powers contained herein shall become null and void on and after _____ unless I am declared to be in a missing status as defined on Page 3 of this document. In the case of such a declaration, this power of attorney shall remain indefinite.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this ____ day of _____, 19__, to the foregoing General Power of Attorney, and for purposes of identification, my signature appears in the right-hand margin of the 3 preceeding pages.

NAME _____
RANK _____
U.S. MARINE CORPS _____

With the United States Armed Forces
at Marine Corps Air Station, Yuma, Arizona 85369-5000

I, _____, the undersigned notary, do hereby certify that on this ____ day of _____, _____, before me personally appeared _____, who is known to me to be the person described in, whose name is subscribed to and who has subscribed to, and who has signed and executed the foregoing instrument, and having first made known to HIM/HER the contents thereof, HE/SHE personally acknowledged to me that HE/SHE signed and sealed the same on the date it bears, as HIS/HER true, free, and voluntary act and deed, for uses, purposes, and considerations here in set forth.

Notary Public

page 4 of 4

SPECIAL POWER OF ATTORNEY**KNOW ALL MEN BY THESE PRESENT:**

That I, _____, a legal resident of the City of _____, United States of America, have made, constituted, appointed, and by these presents do, make, constitute and appoint _____, as my true and lawful attorney, for me and in my name, place and stead, for my use and benefit, and as my act and deed, to do and execute any or all of the following acts, deeds and things, relating to or in any way connected with the below-described matter and no other:

GIVING AND GRANTING unto my said attorney full power and authority to do and perform all and every act, deed, matter and thing whatsoever in, and about, the above-stated matter, as is specified in the foregoing paragraph, as fully and effectually to all intents and purposes as I might or could do in person, were I present. The above specific act may lawfully be done hereunder by my personal representative and assign, unless notice of my death or other revocation notice thereof shall have been received by my said attorney; and whether or not I, the grantor of this instrument, shall have been reported or listed either officially or otherwise as missing, or as a captive as that phrase is used in military parlance, it being the intentment hereof that such status designation shall not bar my attorney from fully and completely exercising this power, and that such report of missing shall neither constitute or be interpreted as constituting notice of my death, nor operate to revoke this instrument.

THIS POWER OF ATTORNEY shall not be affected by the disability, incompetence, or incapacity of the principal.

SIGNATURE

NAME _____

RANK _____

U.S. MARINE CORPS

PAGE 1 OF ____

The powers contained herein shall become null and void on and after the _____, unless I am declared to be in a missing status as defined in Title 37, United States Code, Section 551, by Head, Personal Affairs Branch, Headquarters Marine Corps, or Director, Personal Services Division, Bureau of Naval Personnel, and in the case of such a declarataion, then this power of attorney shall remain indefinite.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this ____ day of _____, ____ to the foregoing Special Power of Attorney, consisting of this and one page, and for purposes of identification, my signature appears in the lower right-hand margin of Page One.

SIGNATURE

NAME _____

RANK _____

U.S. MARINE CORPS

With the United States Armed Forces
at Marine Corps Air Station, Yuma, Arizona

I _____, the undersigned notary, do hereby certify that on this ____ day of _____, _____, before me appeared _____, who is known to me to be the person described in; whose name is subscribed to, and who signed and executed the foregoing instrument, and having first made known to him the contents thereof, he signed and sealed the same on the date it bears, as his true, free and voluntary act and deed, for use, purpose and consideration herein set forth.

Notary

PAGE 2 OF ____

POWERS OF ATTORNEY NOTES

1. A general Power of Attorney (POA) authorizes the agent to act with respect to *any* matter, i.e., do anything that the giver of the power could do personally. A Special Power of Attorney authorizes the agent to perform one or more *specified* acts, e.g., sell a house, cash a check.
2. Servicemembers should grant no greater power than is absolutely necessary. In addition, the agent should be someone in whom the member has absolute trust and confidence. The agent may intentionally or negligently misuse the power. If marital discord exists, a general POA should not be given to the spouse.
3. Determine what the member seeking a POA wants to accomplish. Is there something specific the member wants the agent to do? If so, does the member really need a POA to accomplish this goal? If so, give the member a special POA, particularly for real estate matters and household goods shipment arrangements.
4. How long a period is necessary to accomplish the task, allowing for Murphy's Law? Some states have duration limits. The period should be limited to that reasonably necessary because POAs are difficult to revoke. A POA is not effectively revoked so long as a third party could be misled. Unless durable, the termination date cannot exceed twelve months from the day the POA is executed. The attorney-in-fact should only carry the POA only when actually needed. The POA should be physically destroyed when no longer needed.
5. Third parties need not accept a POA. The member should take the POA to the bank or other intended recipient and find out if they will accept it before deploying. The Department of Motor Vehicles may require that the vehicle identification number be on a POA used in their transactions. Real estate POAs require at least two witnesses to the grantor's signature and a legal description of the property. The power of attorney cannot be used to sign a will or other documents which require the principal's sworn oath, e.g., waiver of Town Tax Affidavits.
6. A power of attorney may become invalid if the grantor becomes disabled or incompetent. To prevent this from occurring, a durable clause can be included. Durable powers of attorney should only be recommended after careful consideration has been given to the circumstances. POAs become invalid upon the grantor's death.

SAMPLE REVOCATION OF POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that I, _____ of _____, do hereby absolutely revoke, cancel, countermand, annul, and make void a certain general/special power of attorney dated the _____ day of _____, 19____, heretofore executed by me, wherein I did appoint _____ my attorney for the purposes in said power set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this _____ day of _____ 19____.

ACKNOWLEDGEMENT

I, _____, the under signed officer, do hereby certify that on this _____ day of _____, 19____ before me personally appeared _____, whose home address is _____, who is known to me to be the identical person who is described in, whose name is subscribed to, and who signed and executed the foregoing instrument, and having first made known the contents thereof, personally acknowledged to me that it was signed and sealed the same on the date it bears as the true, free and voluntary act and deed, for uses, purposes, and considerations therein set forth.

Judge Advocate
Marine Corps Air Station
Yuma, Arizona 85369

PART VIII

CHAPTER 81

ENLISTED ADMINISTRATIVE SEPARATIONS

8101 REFERENCES

- A. SECNAVINST 1910.4 series
- B. DoD Directive 1332.14 series,
- C. Naval Military Personnel Manual, NAVPERS 15560A (MILPERSMAN)
- D. COMNAVMILPERSINST 1910.1D
- E. MCO P1900.16D (MARCORSEPMAN)

8102 **TYPES OF ADMINISTRATIVE SEPARATIONS.** There are two types of separations given in the armed forces to enlisted servicemembers: punitive discharges and administrative separations. Enlisted personnel may be administratively separated with a characterization of service or description of separation (uncharacterized) as warranted by the facts of the particular case. Characterized separations are either honorable, general (under honorable conditions), or under other than honorable conditions (OTH). Uncharacterized separations include the Entry Level Separation (ELS) and the Order of Release (OOR).

A. Honorable. This separation is with honor and is appropriate when the quality of the member's service has met the standards of acceptable conduct and performance of duty or is otherwise so meritorious that any other characterization would be clearly inappropriate.

1. Navy. To qualify for an honorable discharge, a sailor must have a minimum final average for the current enlistment in performance and conduct marks of 2.8 AND a minimum average in personal behavior of 3.0. MILPERSMAN 3610300.3a(1). A member whose marks do not otherwise qualify may nevertheless receive an honorable separation if he was awarded certain personal decorations (e.g., Medal of Honor, Combat Action Ribbon) during the period of service OR prior service.

2. Marine Corps. Marines in pay grade E-4 and below having overall conduct marks for the current enlistment averaging 4.0 and proficiency marks averaging 3.0 are prima facie qualifications. The Marine Corps places great weight

on the commanding officer's recommendation of appropriate characterization. MARCORSEPMAN 6107, 6305. For paygrades E-5 and above, an honorable discharge is automatic unless unusual circumstances warrant other characterization and such characterization is approved by the GCM authority or higher. MARCORSEPMAN, Table 1-1.

B. General (Under Honorable Conditions). This type of separation is issued to servicemembers whose military record is satisfactory, but less than that required for an honorable discharge. It is a separation under honorable conditions and entitles the individual to most veterans' benefits. However the member will not normally be allowed to reenlist. Conduct in the civilian community of a member of a Reserve component who is not on active duty may form the basis for a characterization as general under honorable conditions if such conduct has an adverse impact on the overall effectiveness of the naval service, including military morale and efficiency. MILPERSMAN 3610300.4d; MARCORSEPMAN 6107.2c(4).

C. Under Other Than Honorable Conditions (OTH). This characterization is appropriate when the reason for separation is based upon a pattern of adverse behavior or one or more acts that constitute a significant departure from the conduct expected from members of the naval service. Conduct in the civilian community of a member of a Reserve component who is not on active duty may form the basis for characterization under other than honorable conditions only if such conduct directly affects the performance of military duties. MILPERSMAN 3610300.4d; MARCORSEPMAN 6107.2c(4).

1. OTH recipients are not entitled to retain their uniforms or wear them home (although they may be furnished civilian clothing at a cost of not more than \$40), must accept transportation in kind to their homes, are subject to recoupment of any reenlistment bonus they may have received, are not eligible for notice of discharge to employers, and do not receive mileage fees from the place of discharge to their home of record.

2. The VA will make its own determination with respect as to whether the discharge was under conditions other than honorable. Most veterans' benefits will be forfeited if that determination is adverse to the former servicemember, such as when based on serious misconduct.

D. Entry Level Separation (ELS). A member in an entry level status (generally, the first 180 days on active duty) will ordinarily be separated with an ELS. A member in an entry level status may also be separated with an OTH if the facts of the case warrant (e.g., separation for commission of a serious offense). By the same token, a member in entry level status is not precluded from receiving an honorable discharge when clearly warranted by unusual circumstances and approved

on a case-by-case basis by SECNAV. MILPERSMAN 3610300.5a; MARCORSEPMAN 6107.3a.

E. Order of Release (OOR). A member whose enlistment or induction is void will be separated with an order of release from custody and control of the Navy or Marine Corps. For example, a member would receive this type of uncharacterized separation if the member was a deserter from another service or under age 17 when processed for a minority separation. MILPERSMAN 3610300.5b; MARCORSEPMAN 6107.3b.

8103 **COUNSELING.** In some cases, members must be counseled concerning their behavior before they may be processed for separation. Counseling is intended to give the member an opportunity to improve by identifying specific, undesirable behaviors which the member has the ability to alter or cease. The counseling warning is a commitment to the member that potential for further service exists and correction of identified deficiencies will result in continuation on active duty. Once counseled the member may not be processed for separation without first violating the counseling warning. Counseling must be documented in the service record of the member; only one entry is required. If more than one entry is made, the last entry applies (i.e., it must be violated prior to initiating administrative separation processing).

A. For Navy personnel, the counseling is documented by a page 13 entry or a letter. The counseling must be accomplished by the member's parent command, i.e., the member's command when separation processing begins. For Marine Corps personnel, the counseling is documented by a page 11 entry. The counseling requirement can be accomplished at any command to which the Marine was assigned during the current enlistment.

B. Counseling and rehabilitation efforts are **REQUIRED** before the initiation of separation processing for the following: Convenience of the government due to parenthood, personality disorder and obesity; entry level performance and conduct; unsatisfactory performance; and misconduct due to minor disciplinary infractions or misconduct due to pattern of misconduct. Sample counseling entries appear in the appendix.

C. The command's counseling efforts must be documented in the member's service record and **MUST** include the following information:

1. Written notification concerning deficiencies or impairments. The counseling warning given to the member must clearly inform the member of what is undesirable;

2. specific recommendations for corrective action, indicating any assistance that is available to the member;

3. comprehensive explanation of the consequences of failure to undertake successfully the recommended corrective action; and

4. reasonable opportunity for the member to undertake the recommended corrective action.

5. The counseling warning must be dated and signed by the member. If the member refuses to sign, a notation to that effect is to be made on the counseling form, signed and dated by an officer.

8104 **BOARD RIGHTS.** The discussion of the specific bases for separation below will refer to the method of processing, either notification procedure or administrative board procedure. In that connection, bear in mind that members have a right to an administrative board only if:

- A. The member has more than six years total active and Reserve service;
- B. the command seeks to separate the member with an OTH; OR
- C. the member is being administratively processed for homosexuality.

8105 **BASES FOR SEPARATING ENLISTED PERSONNEL.**

This section describes the various bases for administrative separation with the emphasis on those frequently encountered by the SJA. Each paragraph will indicate the characterizations available for the particular basis, whether counseling is required, and the applicable separation procedure (notification or administrative board).

A. Expiration of enlistment or fulfillment of service obligation. The member receives an honorable, general, or ELS. MILPERSMAN 3620150; MARCORSEPMAN 1005.

B. Selected change in service obligation. This basis is used for general demobilization, reduction in strength, and other "early-outs." The member receives an honorable, general, or ELS. MILPERSMAN 3620100; MARCORSEPMAN 6202.

C. Convenience of the government. The notification procedure is used. The member may receive an honorable, general, or ELS. Convenience of the government separations are "voluntary" and "involuntary." Voluntary separations are requested by the member; involuntary separations are initiated by the commanding

officer. The bases in subparagraphs 1 through 6 below are voluntary. If the basis is voluntary, counseling is not required.

1. Dependency or Hardship. Some members will encounter hardships while on active duty that are not normally encountered by naval personnel. The member who faces these difficulties may request a separation if they can show the following:

- a. Genuine dependency or undue hardship;
- b. Not temporary in nature;
- c. Arising or aggravated since the member's entry into service;
- d. Every reasonable effort has been made to eliminate the hardship;
- e. A discharge will in fact alleviate the hardship; and
- f. That no other means are available. MILPERSMAN 3620210; MARCORSEPMAN 6407.

[The Marine Corps provides for a three-member advisory board to be convened by the officer exercising special court-martial jurisdiction to hear the member's case.]

2. Pregnancy or childbirth. This is initiated upon written request by the female servicemember. The request may be denied in the best interest of the naval service if, for example, the member is serving in a critical rate, has received special compensation during the current enlistment, has not completed obligated service incurred, or has executed orders in a known pregnancy status. MILPERSMAN 3620220; MARCORSEPMAN 6408.

3. Conscientious objection. Persons who by reason of religious training or belief have a firm, fixed, and sincere objection to participate in war in any form or the bearing of arms may claim conscientious objector status. MILPERSMAN 3620200.1d, 1860120; MCO 1306.16E.

4. Surviving family member (inductees only). MILPERSMAN 3620240; MARCORSEPMAN 6410.

5. Sole surviving son or daughter. MILPERSMAN 3620245.

6. Alien. This is a voluntary request initiated upon the written request of the servicemember. The request may be denied in the best interest of the naval service if, for example, the member is serving in a critical rate, has received special compensation during the current enlistment, or has not completed obligated service. MILPERSMAN 3620260.

7. Other designated physical or mental conditions. These are involuntary separations resulting in honorable, general or ELS separations.

a. Obesity. Members who continually exceed height-weight/body fat percentage limits, cannot pass physical fitness tests, perform assigned duties, or present an unsuitable military appearance due to obesity may be separated. The member is required to have been on a weight control/body fat reduction program and counselled at least six months prior to processing. MILPERSMAN 3620250. The Marine Corps considers only pathologically caused obesity (certified by a medical board) as a convenience of the government matter. If the members's obesity is not pathological, the individual is processed for unsatisfactory performance. MARCORSEPMAN 6203.2a(1), 6206.1.

b. Other physical conditions which may warrant separation include motion/air sickness, enuresis (bed-wetting), somnambulism (sleepwalking), and allergies. The Navy and Marine Corps process these cases only when the condition has been confirmed by a medical officer. Unlike obesity, these involuntary separations do not require counseling.

8. Personality Disorder. Separation processing is discretionary with the member's commanding officer, provided a two-part test is satisfied. First, a psychiatrist or psychologist must diagnose the member as having a personality disorder which renders them incapable of serving adequately. The member must then be counseled. (Counseling is NOT required, however, for members who are a danger to themselves or others.) The member may be processed for separation after violating the counseling warning by documented conduct which interferes with the member's performance of duty or indicates a failure to take corrective action after a reasonable time. The member's personality disorder does not shield the member from dual processing for any misconduct. MILPERSMAN 3620200; MARCORSEPMAN 6203.3.

9. Parenthood. When, as a result of parental duties, a member is unable to perform official duties satisfactorily or is unavailable for worldwide assignment, the member may be involuntarily separated under this basis. Counseling is required. Per MILPERSMAN 3810190, military parents, single or married, must provide a plan for dependent care arrangements. After counseling, a commanding officer may give a parent up to 60 days to present an adequate plan.

Noncompliance requires processing for parenthood. MILPERSMAN 3620200.1c; MARCORSEPMAN 6203.1.

D. Disability. A member may be separated for disability per the Disability Evaluation Manual, SECNAVINST 1850.4 series. A medical board must determine that a member is unable to perform the duties of his rate in such a manner as to reasonably fulfill the purpose of his employment on active duty. The member will receive an honorable, general, or ELS. MILPERSMAN 3620270; MARCORSEPMAN, chapter 8.

E. Defective Enlistment and Induction

1. Minority. A member may be separated for enlisting without proper parental consent prior to reaching the age of majority. The type of uncharacterized separation is governed by the member's age when separation processing is commenced/completed. MILPERSMAN 3620285; MARCORSEPMAN 6204.1. If the member is under age 17 when the defect is discovered, the enlistment is void and the member will be separated with an order of release (OOR). If the member is age 17, the member will be separated with an ELS only if the member's parent or guardian so requests within 90 days of the member's enlistment. If the member reaches age 18 before the defect is discovered, separation is not warranted; the member has effected a constructive enlistment. MARCORSEPMAN 6107.3b.

2. Erroneous Enlistment. A member may be separated for erroneous enlistment if the enlistment would not have occurred had certain facts been known and there was no fraudulent conduct on the part of the member, and the defect is unchanged in material respects. The member may receive an honorable, ELS, or OOR. MILPERSMAN 3620280; MARCORSEPMAN 6204.2.

3. New Entrant Drug and Alcohol Testing. New entrants are required to provide a urine sample at boot camp. They are then asked whether the sample will test positive. If they tell the truth and test positive they will be separated with a Reenlistment (RE) Code that will allow them to reenlist with a waiver. If they deny drug use but test positive, they are separated with an RE Code that does not allow them to reenlist. MILPERSMAN (Pending); MARCORSEPMAN 6215.

4. Fraudulent Entry into Naval Service. MILPERSMAN 3630100; MARCORSEPMAN 6204.3.

a. A member may be separated for fraudulent entry for any knowingly false representation or deliberate concealment pertaining to a qualification of military service. The misrepresentation need not relate to a matter which would

bar enlistment; the fraud is material if a waiver would have been necessary had the matter been disclosed. If the false representation of a Navy member relates solely to age, process for minority.

b. Depending on the circumstances, the member may be separated with an honorable, general, OTH or ELS, or OOR. Notification procedures are used unless the member is entitled to a board, i.e., an OTH is sought or the misrepresentation includes preservice homosexuality. Processing is unnecessary where the commanding officer opts to retain and the defect is no longer present, or the defect is waivable and the waiver is obtained from the Commander, NMPC or CMC, as appropriate. Processing is mandatory where the conduct concealed, if done on active duty, could subject a member to an OTH separation.

5. Other Defective Enlistment. MILPERSMAN 3620283; MARCORSEPMAN 6402. A member may be separated on this basis with an honorable, ELS, or OOR if:

a. The member was induced to enlist or reenlist for a program for which the member was not qualified as the result of a material misrepresentation by recruiting personnel upon which the member reasonably relied;

b. the member received a written enlistment commitment from recruiters which cannot be fulfilled; OR

c. the enlistment was involuntary.

F. Entry Level Performance and Conduct. Members in an entry level status (generally the first 180 days) may be separated under this basis if they are unqualified for further military service by reason of unsatisfactory performance or conduct, or both, as evidenced by incapability, lack of reasonable effort, failure to adapt to the naval environment, or minor disciplinary infractions. Counseling is required. Notification procedures are used and the member will receive an ELS. This is not the exclusive means for separating members in an entry level status but this basis will be used where "unsatisfactory performance" or "minor disciplinary infractions" would be appropriate bases for separation of members with more than six months on active duty. MILPERSMAN 3630200; MARCORSEPMAN 6205.

G. Unsatisfactory Performance. MILPERSMAN 3630300; MARCORSEPMAN 6206. Members separated under this basis receive an honorable or general discharge. Counseling is required. Unsatisfactory performance is not demonstrated by disciplinary infractions; cases involving only disciplinary infractions should be processed under misconduct. The Marine Corps includes unsanitary habits and failure to conform to weight standards (non-pathological) as examples of

unsatisfactory performance. MARCORSEPMAN 6206. Members may be separated for unsatisfactory performance if:

1. Their performance of assigned tasks and duties does not contribute to unit readiness and/or mission accomplishment as documented in service records; OR

2. they have failed to maintain required proficiency in rate as demonstrated by:

a. Below-average evaluations (Marine Corps); or

b. Two consecutive enlisted performance evaluations, regular or special, with unsatisfactory marks for professional factors of 1.0 in either military or rating knowledge or with an overall evaluation, where applicable, of 2.0 (Navy).

H. Homosexuality. MILPERSMAN 3630400; MARCORSEPMAN 6207. Homosexuality is incompatible with military service. A member may be administratively separated from the naval service on the basis of preservice, prior service, or current service homosexual conduct or statements. Undisclosed preservice homosexuality constitutes a fraudulent enlistment. The standards and procedures for separation by reason of homosexuality shall apply, but the basis for, and characterization of, separation are governed by regulations for fraudulent enlistment. Commanders who receive apparently reliable information indicating that a member of the unit is homosexual shall inquire thoroughly into the matter to determine all the facts and circumstances of the case.

1. Administrative discharge processing must be initiated if the commander has probable cause to believe:

a. The member has committed, attempted, or solicited a homosexual act;

b. the member credibly admits being a homosexual; OR

c. the member has married or attempted to marry a person of the same sex.

2. If the commander concludes such probable cause does not exist, all action on the case will end. If probable cause exists, board procedures will be followed. In the Navy, if the action is based solely by a court-martial conviction and the court-martial convening authority has remitted or suspended a punitive discharge, the case should be forwarded to that court-martial convening authority

for endorsement prior to forwarding the case to Commander, NMPC. MILPERSMAN 3630400.4a.

3. If the administrative board concludes that one of the three criteria of subparagraph 1 above is shown by a preponderance of the evidence, the member will be separated unless the board further finds:

- a. Such conduct is a departure from the member's usual and customary behavior;
- b. such conduct under all the circumstances is unlikely to recur;
- c. such conduct was not accomplished by use of force, coercion, or intimidation by the member during the period of military service;
- d. under the particular circumstances of the case, the member's continued presence in the naval service is consistent with the interest of the naval service in proper discipline, good order, and morale; and
- e. the member does not desire to engage in or intend to engage in homosexual acts.

4. If a member is separated, the characterization of the discharge will be honorable, general, OTH, or ELS, as warranted by the service record. An OTH may be imposed ONLY IF the board finds that during the current term of service the member attempted, solicited, or committed a homosexual act in one or more of the following circumstances:

- a. By using force, coercion, or intimidation;
- b. with a person under age 16;
- c. with a subordinate;
- d. openly in public view;
- e. for compensation;
- f. aboard a military vessel or aircraft; or

- g. in another location subject to military control under aggravating circumstances noted in the findings that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

I. Drug or Alcohol Abuse Rehabilitation Failure. MILPERSMAN 3630500, 3630550; MARCORSEPMAN 6208, 6209.

1. A member who has been referred to a formal program of rehabilitation for drug or alcohol abuse (per OPNAVINST 5350.4, MCO 5300.12, or MCO 5370.6 series) may be separated for failure to complete such a program successfully when:

- a. There is a lack of potential for continued naval service; or
- b. long-term rehabilitation is determined necessary and the member is transferred to a civilian medical facility for rehabilitation.

2. The failure may be through inability or refusal to participate or cooperate. Failure may occur during inpatient treatment or during the aftercare program (recently extended from 12 months to the remainder of the member's enlistment for the Navy). The member's enrollment in a drug or alcohol rehabilitation program does not preclude separation under any other appropriate basis. The member will receive an honorable, general, or ELS. Typically, notification procedures are used.

J. Misconduct, Minor Disciplinary Infractions. This basis is applied differently in the Navy and Marine Corps. Both services require counseling. MILPERSMAN 3630600, 3630620; MARCORSEPMAN 6210.

1. Navy. The Navy permits use of this basis when the member has at least three, but not more than eight, non-drug related violations which were punished at one or two masts during the current enlistment. The "misconduct, pattern of misconduct" basis should be used if: the violations include three or more periods of unauthorized absence of more than three days duration each; or there are more than eight specifications or two NJPs within the current enlistment. Since the Navy member will receive a general discharge, notification procedures should always be used for minor disciplinary infractions.

2. Marine Corps. Marines may be processed under this basis if they have three minor UCMJ violations documented in the SRB within the current enlistment. The violations need not have been punished at NJP; page 11 entries

suffice. The commander may elect to use the notification procedures or the administrative board procedures, depending on whether a general discharge or OTH respectively will be recommended.

3. Do not process members in an entry level status under this basis; use "entry level performance and conduct" instead. If any of the members offenses carry a punitive discharge in the table of maximum punishments, the proper basis for separation is "misconduct, commission of a serious offense."

K. Misconduct, Pattern of Misconduct. This basis is used for a pattern of more serious misconduct consisting of two or more discreditable involvements with civilian or military authorities or two or more instances of conduct prejudicial to good order and discipline within one enlistment. The pattern may include both minor and more serious infractions. In the Navy, the latest offense must have occurred while assigned to the parent command. Counseling is required in both services. A pattern of misconduct includes the following:

1. An established pattern of minor unauthorized absences;
2. an established pattern of dishonorable failure to pay just debts;
3. an established pattern of dishonorable failure to contribute adequate support to dependents or failure to comply with orders, decrees, or judgments of a civil court concerning support of dependents; and
4. any established pattern of involvement of a discreditable nature with civil or military authorities. The Navy interprets this fourth provision to include: two or more civilian convictions for misdemeanors; three or more punishments under the UCMJ (NJP or courts-martial); or any combination of three civilian misdemeanor convictions or punishments under the UCMJ. MILPERSMAN 3630600.1a(2).

L. Drug Abuse. A member may be separated for even a single drug-related incident. OPNAVINST 5350.4 series defines a drug-related incident, in pertinent part, as: "Any incident in which drugs are a factor [including] voluntary self-referral, use or possession of drugs or drug paraphernalia, or drug trafficking constitute an incident." Counseling is not required.

1. Mandatory Processing. Under OPNAVINST 5350.4 and MCO 5300.12, processing for separation is MANDATORY if the drug incident:

- a. involves drug trafficking, sale, etc.;

- b. a sailor in pay grade E-4 or above on the first incident;
- c. ANY sailor after the second incident; or
- d. a Marine in pay grade E-6 or above on the first incident.

2. Processing Junior Enlisted Personnel

a. Navy. Sailors in pay grades E-3 and below may be retained after their first drug incident if they are not drug dependent and exhibit exceptional potential and desire for future service. If members are drug dependent, they shall be detoxified, separated, and offered VA treatment at separation.

If the sole basis for processing is a court-martial conviction, forward the case to Commander, NMPC via that court-martial convening authority. MILPERSMAN 3630620.3c.

b. Marine Corps. If the Marine has no potential for future service, the CO must process after the first drug incident. If potential exists, the CO may retain the member. After the second incident, the CO may retain only those Marines having exceptional potential for future service; CMC must be notified. After the third incident, the CO must obtain a CMC waiver to retain members with exceptional potential.

3. Characterization of discharge. Under most circumstances involving possession, use, or sale, the member will receive an OTH. If evidence of the incident was derived from a urinalysis, the member can receive an OTH only if the urinalysis results would be admissible at a court-martial. These rules are summarized in the urinalysis chart in the appendix to this chapter. If the urinalysis result cannot be used to characterize the discharge, the command should use the notification procedures unless the member is otherwise entitled to an administrative board. Portable urinalysis kit results may not be used to separate unless the results are confirmed by a DoD laboratory. Unconfirmed results may be used to suspend the member from performing sensitive duties, e.g., PRP, pending confirmation.

M. Misconduct, Commission of a Serious Offense. A member may be separated for commission of a serious military or civilian offense when: the specific circumstances of the offense warrant separation [NMPC's call for Navy cases]; and a punitive discharge would be authorized for the same, or a closely related, offense under the UCMJ.

1. Counseling is not required. No conviction is necessary. If the member was convicted of the serious offense at a court-martial, the member may not relitigate the merits at the administrative board, i.e., the board is bound by the

judicial findings. Further, if the member could have been awarded a punitive discharge but was not, the member will be separated with a general discharge unless SECNAV approves an OTH. If the sole basis for Navy processing is a court-martial conviction, forward the case to Commander, NMPC via that court-martial convening authority. MILPERSMAN 3630600.1(b)(3).

2. A member may NOT be separated on the basis of conduct that has been the subject of federal judicial proceedings resulting in an acquittal. SECNAV authorization is required before processing in the cases of acquittals in state or foreign courts. Neither rule bars processing where the case is dismissed on a matter not going to the merits, e.g., suppression of evidence.

N. Misconduct, Civilian Conviction. A member may be separated upon conviction by civilian authorities, foreign or domestic.

1. Processing is appropriate when the specific circumstances of the offense warrant separation and:

- a. A punitive discharge would be authorized for the same, or a closely related, offense under the UCMJ; OR
- b. the sentence adjudge includes confinement for 6 months or more without regard to suspension or probation.

2. A conviction includes any judicial action tantamount to a finding of guilty, regardless of the label. e.g., nolo pleas, Alford pleas, juvenile proceedings, etc. Separation processing may be begun upon conviction, regardless of appeals. Execution of an approved separation, however, should be withheld pending the outcome of the appeal (or until the time for appeal has passed) unless the member has requested separation or the member's separation has been requested by CNO or CMC and approved by SECNAV.

3. Although sexual perversion is not a specific basis for separation, paragraph 6210.4 of the MARCORSEPMAN indicates that Marines involved in the commission of lewd and lascivious acts, sodomy, indecent exposure, indecent acts or assault on a child, or acts for compensation shall be processed for separation under commission of a serious offense or civilian conviction, as appropriate.

O. Security. Members may be separated by reason of security when their retention is clearly inconsistent with interests of national security. The member may receive an honorable, general, OTH, or ELS. Typically, the notification procedure is used except when an OTH discharge is warranted. MILPERSMAN 3630700; MARCORSEPMAN 6212.

P. Unsatisfactory Participation in the Ready Reserve. A member may be separated by reason of unsatisfactory performance under criteria established in BUPERSINST 5400.42 series or MCO P1000R.1. In the Navy, unsatisfactory participation includes the member's failure to report for physical examination or failure to submit additional information in connection therewith as directed. Discharge proceedings shall not be initiated until 30 days after second notice has been given to the member. The member may receive an honorable, general, or OTH. The notification procedure is used unless an OTH is warranted. MILPERSMAN 3630800; MARCORSEPMAN 6213.

Q. Separation in the Best Interest of the Service. SECNAV may direct the separation of any member in those cases where NONE of the previous reasons for separation apply, or where retention is recommended following separation processing under any other bases for separation discussed above, and separation of the member is considered in the best interest of the service by the Secretary. The member will receive an honorable, general, or ELS. The notification procedure is used; the member has NO right to an administrative board. MILPERSMAN 3630900; MARCORSEPMAN 6214.

8106 **MANDATORY PROCESSING.** The decision whether or not to process an enlisted member for administrative separation is normally a matter within the discretion of the commanding officer. Some bases, however, mandate separation processing. "Mandatory processing" requires only that the case be forwarded to the separation authority for review and final action. The separation authority may still retain the servicemember in certain circumstances. Those bases include:

- A. Homosexuality;
- B. minority under age 17;
- C. fraudulent enlistment unless a waiver is obtained from NMPC (NAVOP 013/87);
- D. drug abuse that involves the illegal use or possession of drugs by sailors, E-4 and above; Marines, E-6 and above;
- E. drug abuse that includes sale of drugs or drug paraphernalia, or possession of drugs in amounts in excess of that reasonably considered to be for personal use;
- F. a felony conviction or commission of a felony (Navy only); and

G. commission of a serious offense that reflects sexual perversion, including, but not limited to, lewd and lascivious acts, sodomy, indecent exposure, and indecent acts with, or assault upon, a child. MILPERSMAN 3610200.2, 3620285.1a; MARCORSEPMAN 1004, 6204, 6207, 6210. Processing in the Marine Corps under paragraphs F and G above is not made mandatory by the MARCORSEPMAN, Marine SJAs should consult with their cognizant separation authority to ascertain whether there are separate local policies on mandatory separation.

8107 **MESSAGE SUBMISSIONS.** In the Navy, when a member has waived his right to an administrative board, commanding officers are authorized to submit the case to Commander, NMPC, by message for final action. After the message is sent, formal submission of the case by letter of transmittal, with supporting documentation, must be forwarded within 15 working days to Commander, NMPC. Formats for the message submission and letter of transmittal are in NMPCINST 1910.1D and reproduced in the appendix for downloading convenience.

8108 ADMINISTRATIVE BOARDS

A. Convening Authority. Per MILPERSMAN 3640350.1b and MARCORSEPMAN 6314, an administrative board may be appointed by:

1. Any Navy special courts-martial convening authority (SPCMA);
and
2. any Marine SPCMA when so authorized by the GCMA.

B. Composition. Administrative boards are composed of three or more experienced Regular or Reserve officers or senior enlisted (E-7 or above), senior to the respondent. The majority of the board must be commissioned or warrant officers. At least one of the officers must be a line officer serving in the grade of O-4 (real not frocked) or higher. In the Navy, if an O-4 line officer is not available at the command, an O-4 staff corps officer may be used. This substitution, however, must be explained by the commanding officer. MILPERSMAN, art. 3640350.1b; MARCORSEPMAN, para. 6315.1.

1. Active-duty Respondent: The senior member must be on the active-duty list. When an active-duty list officer is not available for a Navy board, the convening authority may substitute a USNR-TAR (Training and Administration of Reserves) officer who has been on continuous active duty for over 12 months immediately prior to the board appointments. The explanation as to why an O-4 USN was not available must be included in the letter of transmittal.

2. Reserve Respondent: At least one member of the board shall be a Reserve commissioned officer. All members must be commissioned officers if characterization of service as other than honorable is sought.

3. Commanders are encouraged to appoint women and minorities to sit on boards hearing the case of a female or minority respondent. The failure to appoint a member of such a group to the board, however, does not provide a basis for challenging the proceedings. An odd number of board members be appointed to avoid tie votes.

8109 **BOARD DECISIONS.** MILPERSMAN 3640350.5; MARCORSEPMAN 6319. The board shall determine its findings and recommendations in closed session. A report using the format set forth in NMPC Inst. 1910.1 series will be prepared and signed by all members and counsel for the respondent. Any dissent will be noted on the report; the specific reasons will be recorded separately. At a minimum the report will include:

1. Findings of fact related to EACH basis for processing;
2. recommendations as to retention or separation;
3. if the board recommends separation, it may recommend that the separation be suspended;
4. if separation is recommended, the basis for, and the character of, the separation, must be stated;
5. recommendations as to whether the respondent should be retained in the Ready Reserve as a mobilization asset to fulfill the respondent's total service obligation (not authorized when the board has recommended separation on the basis of homosexuality, misconduct, drug trafficking, or defective enlistment and induction, or has recommended an OTH);
6. in homosexual cases, either a recommendation for separation or special findings required for retention;
7. if separation is recommended and the member is eligible for transfer to the Fleet Reserve/retired list, a recommendation as to whether the member should be transferred in the current or the next inferior paygrade must be made.

8110 **RECORD OF PROCEEDINGS.** The record of proceedings shall be prepared in summarized form, unless the convening authority or separation

authority directs that a verbatim transcript be kept. Following authentication of the record (by the president in the Navy; by the president and the recorder in the Marine Corps) it is forwarded to the convening authority.

A. Navy. Per MILPERSMAN 3640350.6-7 the record of proceedings shall, as a minimum, contain:

1. A summary of the facts and circumstances;
2. supporting documents on which the board's recommendation is based, including (at least) a summary of all testimony;
3. the identity of respondent's counsel and the legal advisor, if any, including their legal qualifications;
4. the identity of recorder and members;
5. a verbatim copy of the board's majority findings and recommendations signed by ALL MEMBERS;
6. the authenticating signature of the president on the entire record of proceedings or, in his absence, any member of the board;
7. signed, dissenting opinions of any member, if applicable, regarding findings and recommendations; and
8. counsel for the respondent's authentication of findings. [NOTE: NAVOP 058/86 makes it unnecessary for counsel for respondent (or respondent, if not represented by counsel) to review the record of proceedings and all supporting documentation before forwarding to NMPC, as long as they are provided a copy prior to submission. A statement of deficiencies can be submitted separately via the convening authority to NMPC. The Report of Administrative Board must still be signed by the board members and counsel for respondent.]

B. Marine Corps. Per MARCORSEPMAN 6320 the record of proceedings shall contain as a minimum:

1. An authenticated copy of the appointing order;
2. any other communication from the CA;
3. a summary of the testimony of all witnesses, including the respondent when she testifies under oath or otherwise;

4. a summary of any sworn or unsworn statements made by absent witnesses, if considered by the board;
5. the identity of the counsel for the respondent and the recorder with their legal qualifications, if any;
6. copies of the letter of notification to the respondent, advisement of rights, and acknowledgement of rights;
7. a complete statement of facts upon which the board's recommendation for discharge is based, accompanied by appropriate supporting documents;
8. a summary of any unsworn statement submitted by the respondent or his counsel; and
9. the respondent's signed acknowledgement that he was advised of, and fully understood, all of his rights before the board.

8111 ACTIONS BY THE CONVENING AUTHORITY

A. Navy. If the commanding officer determines that the respondent should be retained, the case may be closed. If processing was mandatory, however, the case must be referred to NMPC for disposition. MILPERSMAN 3640350.1.

1. If separation processing is mandatory or the commanding officer decides that separation is warranted, the report is forwarded in a letter of transmittal to NMPC for action. The convening authority may NOT recommend a characterization less favorable than the board's.

2. NAVOP 013/87, reproduced in the appendix, authorizes the SPCMA to act as the separation authority when the member does not object to the processing for separation and processing is for certain bases. NMPC retains separation authority for other listed bases. In particular, NMPC retains separation authority if: the administrative board recommends an OTH, irrespective of the basis for processing; the board recommends retention or suspension of the discharge; the member has over 18 years of service; the member protests being processed, or the member is being processed for misconduct-drug abuse that can be used to characterize service. When the SPCMA acts as separation authority, the DD 214 and allied paperwork must be sent to NMPC after separation has been completed.

B. Marine Corps. If the convening authority is not the appropriate separation authority, the convening authority will forward the case with a recom-

separation authority with power to send a case to a second board hearing. Neither the members nor the recorder from the first board may sit as voting members of the second board. Although the second board may consider the record of the first board's proceedings, less any prejudicial matter, it may neither see nor learn of the first board's findings, opinions, or recommendation. Additionally, the separation authority may not approve findings or recommendations of the subsequent board which are less favorable to the respondent than those ordered by the previous board, unless the separation authority finds that fraud or collusion in the previous board is attributable to the respondent or an individual acting on the respondent's behalf.]

8113 SUSPENSION OF SEPARATION. Except when the bases for separation are fraudulent enlistment or homosexuality and, in the Marine Corps, when the approved separation is an OTH, a separation may be suspended by the separation authority or higher authority for a specified period of not more than 12 months if the circumstances of the case indicate a reasonable likelihood of rehabilitation. Prior to vacation of a suspension, the member shall be notified in writing of the basis for the action and shall be afforded the opportunity to consult with counsel and to submit a statement in writing to the separation authority. The respondent must be afforded at least two days to act on the notice. MILPERSMAN 3610200.14; MARCORSEPMAN 6310.

8114 PROCESSING GOALS. Every effort should be taken to meet SECNAV's processing time goals. When board action is not required or is waived, separation action should be completed in 15 working days from the date of notification to the date of separation. If the initiating authority and the separation authority are not located in the same geographical region, the initiating authority gets 10 working days from the date of notification and the separation authority should separate by the 30th working day. In board cases, the initiating command gets 30 working days from the date of notification and the separation authority should separate by the 50th working day. When action is required by the Secretary, final action should be completed in 55 working days. MILPERSMAN 3610100.9; MARCORSEPMAN 6102.

ADMINISTRATIVE DISCHARGE CHECKLIST

The following checklist will assist you in preparing the documents needed for processing a servicemember for discharge under the notification procedure or the administrative board procedure, whichever is appropriate under the circumstances. Examples are also provided for the documents needed under both methods. You should consult chapter 36 of MILPERSMAN, NAVMILPERSCOMINST 1910.1D, NAVOP 013/87, and OPNAVINST 5350.4B for guidance.

1. Prepare the Notice of Proposed Action with the First Endorsement and the Statement of Awareness and Request for Privileges. Be sure to use the examples for the proper procedure (notification procedure or administrative board procedure), as the examples are different.
2. Deliver the Notice of Proposed Action to the member. Briefly explain what the options are for the member to ensure his/her understanding.
3. If member knows at this time which rights he/she wishes to elect, have him/her complete and sign the Statement of Awareness and Request for Privileges. Be sure to have the member waive the two-day waiting period.
4. If member needs time to think about which rights he/she desires, explain the two-day waiting period and inform him/her when the response is required.
5. If member wishes to consult with counsel prior to electing his/her rights, contact the NLSO, make arrangements for counsel, and inform the member of the time and date of the appointment.
6. Have member take his service record, a copy of the Letter of Notification, the Statement of Awareness, and any investigative reports to his counsel. Note: It is suggested that these documents be placed in a sealed envelope with a return envelope enclosed. The member should be directed not to open the package, and the defense counsel should be asked to reseal the documents in the return envelope. This helps to prevent the "loss" of documents or pages from the service record while in transit. Another approach would be to deliver the documents early or to place them in the custody of the duty driver.
7. If member is not eligible or does not elect an administrative discharge board, consult NAVOP 013/87 to see if command can act as separation authority. (If member has elected an administrative discharge board,

go to number 10 below.) If command is authorized to act as separation authority, then coordinate with the administrative department to have separation paperwork complete. Consult NAVOP 013/87 and MILPERSMAN 3640200.7 and 3640370 for guidance. Be sure that servicemember signs a document (in addition to notification and statement of awareness paperwork) agreeing to be separated and not objecting to characterization of service. Send all documents, with a letter of transmittal, to NMPC upon separation of individual.

8. If command is not authorized to act as separation authority, then complete the Letter of Transmittal asking NMPC to separate. Consult NAVMILPERSCOMINST 1910.1D to determine when message requests are required or desired. When complete, make sufficient copies to place one in member's service record, one for the respondent, one for the office files, and whatever number is required for the administrative officer for command correspondence files.
9. Upon receipt of discharge authority, arrange with personnel or PSD for final out-processing.
10. If member has elected an administrative discharge board, an appointing letter for the members of the board must be prepared and signed by the commanding officer.
11. Distribute a copy of the appointing letter to each member, counsel for the respondent, the recorder (if someone other than yourself), and retain a copy for your files.
12. It is suggested that an administrative discharge board package be prepared for each member. These packages consist of copies of the Administrative Discharge Board Guide and MILPERSMAN, sections 3640300 through 3640350, and those sections that pertain to the grounds for processing. This will ensure that the members are familiar with the procedures prior to the start of the board.
13. Arrange for a time and place for the board to be held and inform all parties.
14. If the proceedings are to be recorded on a tape player, ensure that there are enough tapes for the proceeding. (This is not required, but may be helpful in preparing the results of the proceedings.)

15. Prepare a findings worksheet for the members and privacy act statement for the respondent.
16. Mark and copy any exhibits you will need as recorder prior to the board.
17. Obtain a list of witnesses from the counsel for the respondent and arrange for their presence at the hearing. Requests for out-of-area witnesses are handled much like E&M witness requests.
18. After the board is completed, collect all exhibits and materials. Have board members and counsel for respondent sign findings worksheet.
19. Prepare the report of the administrative board proceedings for the senior member to authenticate.
20. Forward these to the counsel for the respondent for review and/or comment if requested.
21. Prepare the Letter of Transmittal to NMPC for the commanding officer's signature.
22. Make sufficient copies of the transmittal letter, the report of the administrative board and the findings for the member's service record, for the respondent, for the office files, and as needed for the command's correspondence files.
23. Upon notification of retention or discharge from COMNAVMIL-PERSCOM, file a copy in the service record and in the office file and give one copy to the member.
24. If member has been retained, normally a warning will be required by COMNAVMILPERSCOM. This must be completed and filed in member's record.
25. If member has been discharged, contact personnel or PSD for final out-processing.

NAVOP 013/87
201614Z FEB 87

(Cites are to MILPERSMAN)

1. COMMANDING OFFICERS WITH SPECIAL COURT-MARTIAL CONVENING AUTHORITY MAY ACT AS SEPARATION AUTHORITY IF:

- 1. MEMBER DOES NOT OPPOSE THE DISCHARGE.**
- 2. LEAST FAVORABLE DISCHARGE IS HON/GEN/ELS.**
- 3. MEMBER HAS LESS THAN 18 YEARS OF SERVICE.**
- 4. REASON FOR ADSEP QUALIFIES (SEE BELOW).**

2. COMMANDING OFFICERS EXERCISING SPECIAL COURT-MARTIAL CONVENING AUTHORITY MAY EFFECT SEPARATION FOR THESE REASONS:

- 1. PARENTHOOD. (3620220)**
- 2. SOME PHYSICAL/MENTAL CONDITIONS. (3620200)**
- 3. DEPENDENCY/HARDSHIP. (3620210)**
- 4. PREGNANCY/CHILDBIRTH. (3620220)**
- 5. SURVIVING FAMILY MEMBER. (3620240/3620245)**
- 6. OBESITY. (3620250)**
- 7. ERRONEOUS ENLISTMENT. (3620280)**
- 8. FRAUDULENT ENLISTMENT (ONLY IF OTH NOT ELIGIBLE). (3630100)**
- 9. ENTRY LEVEL PERFORMANCE AND CONDUCT. (3630200)**
- 10. UNSATISFACTORY PERFORMANCE. (3630300)**
- 11. HOMOSEXUALITY (ONLY IF ADMIN BOARD RECOMMENDS A GEN DISCHARGE OR BETTER). (3630400)**
- 12. DRUG/ALCOHOL ABUSE REHAB FAILURE. (3630500/3630550)**
- 13. SOME MISCONDUCT (MINOR DISCIPLINARY INFRACTIONS). (3630600)**
- 14. DRUG ABUSE (ONLY IF EVIDENCE CAN'T BE USED TO PUNISH OR CHARACTERIZE). (3630620)**

3. SEPARATION AUTHORITY HAS BEEN RETAINED BY NMPC FOR THESE REASONS:

- 1. CONSCIENTIOUS OBJECTORS. (1860120)**
- 2. SELECTED CHANGES IN SERVICE OBLIGATION.**
- 3. EXPIRATION OF ENLISTMENT. (3620100/3620150)**
- 4. MOTION/AIR SICKNESS. (3620220)**
- 5. ALLERGIES. (3620220)**
- 6. DISABILITY. (3620270)**
- 7. DEFECTIVE ENLISTMENT. (3620280)**
- 8. MINORITY. (3620285)**
- 9. MISCONDUCT/DRUG ABUSE. (3630620)**
- 10. OTH IN LIEU OF TRIAL. (3630650)**

11. SECURITY. (3630700)
12. BEST INTEREST OF THE SERVICE. (3630900)

4. THE CO MUST:

1. PROTECT THE VALUE OF AN HON DISCHARGE.
2. PROCESS ON ALL BASES SUPPORTED BY THE FACTS.
3. VERIFY MEMBER DOES NOT OBJECT AND SIGNS.
4. FORWARD ALL DOCUMENTS AND DD 214 TO NMPC.
5. DON'T SEPARATE IF MEMBER IS UA.
6. RECOUP SRB.
7. OFFER VA TREATMENT IF DRUG/ALCOHOL DEPENDENT.

5. HOW TO PROCESS:

1. IF THE MEMBER WAIVES HIS RIGHT TO AN ADMIN BOARD OR IS NOT ENTITLED TO ONE AND CAN BE PROCESSED UNDER THE NAVOP GATHER ALL APPLICABLE INFORMATION (LETTER OF NOTIFICATION, STATEMENT OF AWARENESS, PAGE 9 WITH FINAL TRAIT AVERAGES, ETC.) AND ENCLOSE WITH THE LETTER OF TRANSMITTAL FORMAT TO NMPC (SEE MILPERSMAN 3640300.10).

2. ENSURE THAT YOU NOT ONLY REFERENCE THE APPLICABLE MILPERSMAN SECTIONS BUT ALSO THE NAVOP. ONCE THE CO HAS DECIDED TO DISCHARGE THE MEMBER UNDER THE NAVOP HE MUST STATE THIS IN THE LAST PARAGRAPH OF THE LETTER OF TRANSMITTAL, e.g. " THEREFORE UNDER REFERENCE (A) I HAVE DETERMINED THAT THE INDIVIDUAL SHOULD BE DISCHARGED FOR ... AND THE DISCHARGE SHOULD BE CHARACTERIZED AS UNDER REFERENCE (B) I HAVE APPROVED THE DISCHARGE AND HAVE ORDERED IT EXECUTED. THE APPLICABLE COPY OF THE MEMBER'S DD-214 IS ENCLOSURE __."

SAMPLE LETTER OF COUNSELING/WARNING FORMAT

Preliminary Notes: Counseling is intended to give a member opportunity to improve by identifying specific, undesirable behaviors which the member has the ability to alter or cease. The member must be **CLEARLY** informed of what is undesirable. In addition, counseling which addresses misconduct, without linking it to a personality disorder, entry level performance and conduct, or unsatisfactory performance **CANNOT** be used to process the member for those reasons. Finally, to process a member for "misconduct due to a pattern of misconduct as evidenced by an established pattern of failure to pay just debts/to support dependents," counseling **MUST** address bad debts/returned checks or nonsupport. Consider the following examples.

1. Personality disorder

CORRECT: "a personality disorder manifested by inconsistent performance, habitual tardiness, argumentative behavior, being distracted and failing to complete assigned work, poor impulse control, aggressive behavior"

CORRECT: "a personality disorder manifested by CO's NJP for UCMJ Art. 128 (simple assault), Art. 86 (missing restricted man's muster), Art. 117 (provoking speech, gestures)

INCORRECT: "borderline personality disorder, chronic, severe" "immature personality disorder, failure to adjust"

2. Entry level performance and conduct/Unsatisfactory Performance

CORRECT: "habitual tardiness, failure to complete assigned duties, failure to complete PQS within allotted time, failure to stand a proper watch"

INCORRECT: "failure to perform in the manner expected of a PO3"

3. Misconduct due to minor disciplinary infractions, misconduct due to a pattern of misconduct

CORRECT: "habitual tardiness, unauthorized absences, alcohol abuse, breach of peace"; "violation of UCMJ Arts. 86, 134 (incapacitated for the performance of duty), 116"

INCORRECT: "minor disciplinary infractions"; "pattern of misconduct"

SAMPLE LETTER OF COUNSELING/WARNING FORMAT

USE THIS FORMAT FOR MEMBERS WHO ARE BEING WARNED PER THE COUNSELING REQUIREMENTS FOR SEPARATION BY REASON OF PARENTHOOD, PERSONALITY DISORDER, ENTRY LEVEL PERFORMANCE AND CONDUCT, UNSATISFACTORY PERFORMANCE, AND/OR MISCONDUCT DUE TO MINOR DISCIPLINARY INFRACTIONS OR PATTERN OF MISCONDUCT.

1. You are being retained in the Naval Service, however, the following deficiencies in your performance and/or conduct are identified:

2. The following are recommendations for corrective action:

3. Assistance is available through: _____

4. Any further deficiencies in your performance and/or conduct will terminate the reasonable period of time for rehabilitation that this counseling/warning entry implies and may result in disciplinary action and in processing for administrative separation. All deficiencies or misconduct during your current enlistment, occurring before and after the date of this action will be considered. Subsequent violation(s) of the UCMJ or conduct resulting in civilian conviction could result in an administrative separation under other than honorable conditions.

5. This counseling/warning entry is made to afford you an opportunity to undertake the recommended corrective action. Any failure to adhere to the guidelines cited above, which is reflected in your future performance and/or conduct, will make you eligible for administrative separation action.

6. This counseling/warning entry is based upon known deficiencies or misconduct. If misconduct, which is unknown to the Commanding Officer at the date of this entry, is later found to have occurred prior to this entry, this letter of counsel/warning may be considered void.

(Signature of Sailor)

(Signature of Witness)

SAMPLE USMC COUNSELING FORM IN MARCORSEPMAN PARA. 6105.3d

" Date . Counseled this date concerning deficiencies (list deficiencies); specific recommendations for corrective action; assistance available; and advised that failure to take corrective action may result in administrative separation or judicial proceedings. I have been afforded the opportunity to make a statement per U.S. Navy Regs, Article 1110, and if I make a written statement it will be forwarded to CMC (Code MSRB-20) for inclusion in my Official Military Personnel File. I (do)(do not) desire to make a statement. (Statement (if any) is filed on the document side of the service record.)

(Signature of Marine)

(Signature of Commanding Officer)

SAMPLE NOTICE OF A NOTIFICATION PROCEDURE PROPOSED ACTION

From: Commanding Officer

To: (Rate, Name, USN(R), SSN)

Subj: NOTICE OF A NOTIFICATION PROCEDURE PROPOSED ACTION

Ref: (a) MILPERSMAN [Paragraph]

1. Under reference (a), you are being considered for an administrative separation from the naval service by reason of [list specific reason or reasons as appropriate as evidenced by specifics of basis for separation] misconduct due to minor disciplinary infractions as evidenced by all punishments under the UCMJ and misdemeanor civil convictions in your current enlistment and alcohol abuse rehabilitation failure as evidenced by your continued alcohol abuse subsequent to inpatient treatment within the last 12 months. [See enclosure (15) of NMPCINST 1910.1D for correct statement of reasons and corresponding MILPERSMAN reference.]

2. If the separation is approved by the Commander, Naval Military Personnel Command or Commanding Officer, _____, it will result in [list one of the following]:

- () discharge
- () release from active duty to a reserve component
- () transfer from the Selected Reserve to the IRR
- () release from custody or control of the U.S. Navy
- () other form of separation (specify)

3. If separation is approved, the least favorable description of service authorized in your case is [Entry Level Separation, where applicable, or a characterization of service as General].

4. You are entitled to the following rights :

a. If applicable - to request transfer to the Fleet reserve/retired list, understanding that a reduction in paygrade prior to transfer may be directed if you are being processed for misconduct or security.

b. To obtain copies of documents that will be forwarded to Commander, Naval Military Personnel Command, supporting the basis for the recommended separation. (Classified documents may be summarized).

c. To submit statements.

d. To consult with counsel qualified under Article 27(b) of the UCMJ. Nonlawyer counsel may be appointed if you are deployed aboard a vessel or in similar circumstances of separation from judge advocate resources as determined by commanding officer. You may consult with civilian counsel retained at no expense to the United States.

e. To an administrative board if you have six or more years of total active and reserve military service.

f. You have at least two working days to respond to this notice. [Note: Must be at least two days in most cases, and 30 days if member is in confinement or a reservist not on active duty. The CO may set any reasonable maximum time.] Failure to respond will result in a waiver of all rights.

g. To waive any or all of the above rights and privileges after being afforded a reasonable opportunity to consult with counsel.

5. Should you begin a period of unauthorized absence following delivery of this Notice of Action, the separation processing in your case may proceed in your absence, to include convening an administrative discharge board if one has been elected. However, processing need not necessarily proceed and desertion charges could possibly result.

6. [For members in civil confinement] You are hereby advised that separation proceedings in your case will be suspended for the time specified in paragraph 4f after the date this Notice is delivered to your confinement address to give you a reasonable opportunity to exercise the rights set forth herein. [Insert name, address and telephone number of counsel] has been appointed your military counsel for consultation and/or representation for this action.

7. [For Reservists not on active duty] You are hereby advised that the separation proceedings in your case may continue in your absence if you so request or if you fail to respond to this notice within the time specified in paragraph 4f, provided the Notice is delivered to you personally or received at your designated mailing address. [Note: Subparagraph 4f must be included in Letter of Notification/Statement of Awareness despite this paragraph.]

8. [For Reservists not on active duty whose separation may involve transfer to the Inactive Ready Reserve (IRR)] You are advised that the characterization of service upon transfer to the IRR also will constitute the characterization of service upon discharge at the completion of your naval service obligation, unless the following conditions are met:

a. You take affirmative action to affiliate with a drilling unit of the Selected Reserve; and

b. You participate satisfactorily as a drilling member of the Selected Reserve for a period of time which, when added to any prior satisfactory service during this period of obligated service, equals the period of obligated service.

Signature of Command Representative

FIRST ENDORSEMENT

From: [Respondent]

To: Commanding Officer, _____

1. I have received the above letter and I understand its contents.

Respondent's Signature/date of delivery to the member

SAMPLE STATEMENT OF AWARENESS FORMAT-NOTIFICATION PROCEDURE

[Note: Any mark/initialing made within closed parentheses () indicates member elects that option. If a member desires to indicate awareness of a right which he or she is not electing, check or initial outside of ().]

From: [Rate, Name, USN(R), SSN]

To: Commanding Officer, _____

Subj: STATEMENT OF AWARENESS AND REQUEST FOR, OR WAIVER OF,
PRIVILEGES

Ref: (a) CO, _____ ltr _____
(b) MILPERSMAN

1. I understand that per references (a) and (b) I am being considered for an administrative separation which could result in [(an entry level separation) (characterization of discharge as (General))] by reason of my [restate the reason(s) for processing as they are given in paragraph (1) of Letter of Notification] and that I am subject to, and may be separated with, a discharge which will reflect the [character of my naval service] or [severity of my misconduct] as appropriate and/or my defective enlistment and induction due to fraudulent entry into Naval Service.

[Members shall be processed for ALL reasons for which they meet the minimum criteria.]

2. I have been advised that if the proposed separation is approved by Commander, Naval Military Personnel Command or by Commanding Officer, _____, it will result in my discharge for one of the reason(s) stated in paragraph 1 above.

3. I understand that if separation is approved, the characterization of my service can be [fill in as stated in paragraph 3 of the Notice of a Notification Procedure Proposed Action].

4. I have been afforded and elect the following rights:

() If applicable - I have/will request(ed) transfer to the Fleet Reserve/retired list, understanding that a reduction in pay grade prior to transfer may be directed if I am being processed for misconduct or security.

() To obtain copies of documents that will be forwarded to Commander, Naval Military Personnel Command, supporting the basis for the proposed separation. (Classified documents may be summarized.)

() To submit statements.

() To consult with counsel qualified under Article 27(b) of the UCMJ or, when circumstances warrant, nonlawyer counsel.

() To request an Administrative Board if I have six or more years of total active and reserve military service.

() To have _____ working days to respond to the Notice of Notification Procedure Proposed Action. [Must be 30 days if member is in confinement or a reservist not on active duty.]

() To waive all the above.

() I object/do not object to this separation.

5. I acknowledge the following: (check as appropriate)

() A. I understand that nonjudicial punishments, court-martial convictions and/or civil convictions occurring before and after this statement of awareness may be considered by the separation authority in determining retention or separation where appropriate and the characterization of any discharge to be recommended.

() B. I understand the administrative board that I have elected may consider nonjudicial punishments, court-martial convictions and civil convictions occurring up to the announcement of the findings and recommendation of the board in determining retention or separation and the characterization of any discharge to be recommended.

Respondent's name, rate, SSN/Date

Witnessed by:

Signature

date

Counsel [if applicable]

[If the member elects the minimum time to respond, the date and signature on the statement of awareness should reflect at least the minimum time elected when compared with the date on the letter of notification.]

NOTIFICATION OF SEPARATION PROCEEDINGS (USMC)
MCO 1900.16D (MARCORPSEPMAN); Figure 6-2

[Letterhead]

From: Commanding Officer
To: (Individual Marine)

Subj: NOTIFICATION OF SEPARATION PROCEEDINGS

Ref: (a) MCO 1900.16D (MARCORPSEPMAN)

Encl: (1) Purpose and Scope of the NDRB and BCNR
(2) Acknowledgement of Respondent's Rights

1. You are hereby notified that I intend to recommend to the [Separation Authority; e.g., Commanding General] that you be discharged from the U.S. Marine Corps/released from active duty to a Reserve component per paragraph ____ of the reference by reason of [state the general and specific bases for discharge contained in the reference].
2. The basis [bases if multiple reasons] for this recommendation is [describe the circumstances supporting the CO's recommendation. Be specific because both the respondent and the Separation Authority need to know precisely why this Marine is being recommended for separation].
3. The least favorable characterization which you may receive is under honorable conditions (general). Although the [Separation Authority] will make the determination of characterization if you are separated, I am recommending you receive a(n) [Honorable] [General] characterization of service.
4. As a result of these separation proceedings, you have the following rights:
 - a. You have the right to consult with qualified counsel. It is in your best interests to do so prior to waiving any of your rights.
 - b. You have the right to submit written statements to the [Separation Authority] in rebuttal to this proposed separation.
 - c. You have the right to obtain copies of documents that will be forwarded to the [Separation Authority] supporting the basis of this proposed separation. Classified documents shall be summarized.

d. You may waive any of these rights after being afforded a reasonable opportunity to consult with counsel and that failure to respond shall constitute a waiver of these rights.

5. Information on the Purpose and Scope of the NDRB and the BCNR is provided to you as enclosure (1).

6. You are directed to respond in writing to this notice not later than [time and date, (e.g., 0900, 4 Jun 82. Must allow at least 2 complete working days] by completing and returning enclosure (2). Failure to respond by the prescribed time constitutes a waiver of your rights.

Signature

MARINE CORPS SEPARATION AND RETIREMENT MANUAL

[Letterhead]

From: Individual Marine
To: Commanding Officer

Subj: ACKNOWLEDGMENT OF MY RIGHTS TO BE EXERCISED OR WAIVED
DURING SEPARATION PROCEEDINGS

Ref: (a) CO's ltr of

1. _____ I acknowledge receipt of the reference notifying me of proceedings to [discharge me][release me from active duty] by reason of [general and specific basis as found in MARCOPSEPMAN].

2. _____ I understand that I am being recommended for separation with [an honorable][an under honorable conditions (general)] characterization of service and that the least favorable characterization which I may receive is under honorable conditions (general).

3. In view of the above, I chose to execute to following rights:

a. _____ I (have) (have not) included statements in rebuttal to this proposed separation.

b. _____ I (have) (have not) consulted with counsel. I realize it is in my best interests to do so prior to exercising or waiving any of my rights. My counselor's name is: _____.

c. _____ I (do) (do not) desired to obtain copies of documents that will be forwarded to the [Separation Authority] supporting this proposed separation.

4. _____ I have read and fully understand the information contained in the Purpose and Scope of the NDRB and BCNR.

Witness Date

Respondent Date

SAMPLE LETER OF TRANSMITTAL FORMAT - NOTIFICATION PROCEDURE

From: Commanding Officer, _____ (UIC)

To: Commander, Naval Military Personnel Command

Subj: (RATE, NAME, USN(R), SSN), RECOMMENDATION FOR SEPARATION
DUE TO [LIST ONE OR MORE OF THE REASONS FOR SEPARATION]

Ref: (a) MILPERSMAN _____

Encl: (1) Notice of notification procedure proposed action (copy)

(2) Signed statement of awareness and request for or waiver of rights

(3) Statement of member, if one is submitted

(4) Copy of page 9, with final trait averages

(5) Information concerning arrest, conviction, or disposition (include civil document if available), if applicable

(6) Other pertinent documentation (include medical evaluation regarding dependency of member if drug/alcohol abuse is indicated within last six months or subsequent to most recent drug incident, most recent warning and counseling entry (if any), etc.

(7) Proceedings of Administrative Board, if applicable

(8) Appointing letter for nonlawyer counsel, if applicable

1. Per reference (a), the following information is submitted:

a. Reason for processing [one or more reasons].

b. Basic record data: date of current enlistment: (fill in) for (fill in) years; EAOS: (fill in); marital status: (fill in); dependents: (fill in); months on board: (fill in); total service: active- (fill in number of years and months), inactive (fill in number of years and months and date commenced).

c. Involvement with civil authorities. If none, so state. Advise if member has appealed or intends to appeal any civil convictions. If appealed, when, what result or anticipated decision date. If not, what is the time frame member has to appeal. POC.

d. Summary of military offense(s). If none, so state. Otherwise, in subparagraph form, give complete, detailed summary of UCMJ violations, i.e., judicial action, charges and specifications, date and/or period of offense(s), and punishment awarded; must include the convening authority's final action for all courts-martial.

- e. Finding of Administrative Board. If no board, so state.
- f. Recommendation of Administrative Board. If no board, so state.
- g. Type of discharge recommended by Administrative Board. [If no board, so state. If fleet reserve eligible - Board must note recommendation regarding reduction in paygrade prior to transfer if member processed for misconduct, homosexuality or security and member elected right to transfer to the fleet reserve.]
- h. Contents and recommendations of the commanding officer [or acting commanding officer. Per reference (a), the commanding officer may not recommend any characterization worse than what the Administrative Board recommended.]
- i. Date and characterization of discharge if commanding officer separates under reference (a). POC for discussion of this case is [Name, Rank, Billet, Autovon telephone number; State location of member if transferred TAD subsequent to completion of case processing.]

Signature of Commanding Officer
or acting Commanding Officer

Copy to :
(appropriate PERSUPPACT/
PERSUPPDET where applicable)

SUBMISSION OF NOTIFICATION PROCEDURE PROPOSED ACTION
MESSAGE FORMAT

FROM:

TO: COMNAVMILPERSCOM WASHINGTON DC

INFO: (ISIC, AS DESIRED AND TRANSITPERSU, PERSUPPACT/PERSUPPDET
WHERE APPLICABLE)

UNCLAS //N01910//

SUBJ: (RATE, NAME OF MEMBER, COMPONENT, SSN): RECOMMENDATION
FOR ADMIN SEPARTION BY REASON OF _____ (N8322)

A. MILPERSMAN _____ (ARTCLE(S) CITINTG REASON (S))

B. NAVMILPERSCOMINST 1910.ID

1. IAW REFS A AND B FOLLOWING REQUEST FOR ADMIN DISCH
SUBMITTED ICO SNM. CO HAS REVIEWED REFS A AND B AND CERTIFIES
THAT THIS MESSAGE SUBMISSION SUPPORTS THE MOST APPLICABLE
REASONS) FORPROCESSING ACCURATELY REFLECTS THE COMPLETE
RECORD IN THISCASE, AND MEETS MINIMAL RDQUIREMENTS FOR
PROCESSING. IF DRUG OR ALCOHOL ABUSE IS INVOLVED INFO FM MOST
RECENT DRUG OR ALCOHOLSUBSTANCE ABUSE REPORT IS CONTANED IN
PARA 13. AN ADMINISTRATIVE DISCHARGE BOARD HAS NOT BEEN
CONVENED IN THIS CASE.INFORMATION PARAGRAPHS AS OUTLINED IN
ENCL 5 TO REF B ARELISTED IN TOTAL WITH APPLICABLE INFORMATION
NOTED. IF PARA DOESNOT APPLY, 'NA' HAS BEEN INDICATED.

2. REASON FOR SEPARATION PPOCESSING: [ONE OR MORE SPECIFIC
REASON(S) VERBATIM AS SPECIFIED IN MILPERSMAN. BRIEFLY
SUMMARIZE HOW CASE FORSEPARATION WAS DEVELOPED, SPECIFICALLY
THE BASIS FOR PROCESSING (E.G., COMMAND DIRECTED URINALYSIS,
RECORD OF MISCONDUCT, REFUSAL TO PARTICIPATE IN REHAB, ETC).]

3. BASIC RECORD DATA: DATE OF CURRENT ENISTMENT: (DATE) FOR
(FILL IN) YEARS; EAOS: (FILL IN) MARITAL STATUS: (FILL IN) DEPENDENTS:
(FILL IN); MONTHS ON BOARD: (FILL IN); TOTAL SERVICE ACTIVE: (FILL IN
NUMBER OF YEARS AND MONTHS); INACTIVE: (FILL IN NUWER OF YEARS
AND MONTHS AND WHEN COMMENCED); REENLISTMENT STATUS: (FILL
IN "RECOMMENDED/NOT RECOMMENDED.")

4. INVOLVEMENT WITH CIVILIAN AUTHORITIES: [FILL IN AS

APPROPRIATE. IF CIVILIAN CONVICTION, INCLUDE INFO IN PARAs A AND B BELOW.]

A. CIRCUMSTANCES OF OFFENSE(S): [INCLUDE ALL FACTS AND CIRCUMSTANCES SURROUNDING OFFENSE(S) IN SUFFICIENT DETAIL TO INDICATE NATURE AND SERIOUSNESS.]

B. ACTION BY CIVILIAN AUTHORITIES: [INCLUDE CITATION OF CIVIL STATUTE(S) VIOLATED, CHARGE(S) ON WHICH TRIED AND CONVICTED, COURT IN WHICH CONVICTED, SENTENCE OF COURT, MAXIMUM PUNISHMENT WHICH COULD HAVE BEEN IMPOSED FOR SUCH A CONVICTION UNDER UCMJ, AND STATUS OF ANY APPEAL. ADVISE IF MEMBER HAS FILED OR INTENDS TO FILE AN APPEAL, AND TIME LIMIT WITHIN WHICH MEMBER MUST FILE APPEAL.]

5. SUMMARY OF MILITARY OFFENSE(S): [LIST IN CHRONOLOGICAL ORDER BY SUBPARAGRAPH DATE OF NJP/CM; TYPE : NJP/CM; OFFENSE(S) ; DATE OF OFFENSE(S); NOTE: IDENTIFY OFFENSE(S) TO INCLUDE ALL SPECIFICATIONS, E.G., LENGTH OF UA OFFENSE(S), ETC. ICO COURTS-MARTIAL INDICATE DATE OF CONVENING AUTHORITY FINAL ACTION AND APPROVED FINDINGS AND SENTENCE) PROVIDE DATE OF PG 13 LTR OF COUNSELING/WARNING HERE AS WELL AS IN PARA 13.]

6. SNM'S PAGE 9 IS PROVIDED IN TOTAL AS FOLLOWS: [REFLECT ALL PERFORMANCE MARKS, UCMJ PUNISHMENT(S) AND FINAL TRAIT AVERAGES.]

7. NOTICE OF A NOTIFICATION PROCEDURE PROPOSED ACTION DTD (FILL IN), PROVIDED IAW MILPERSMAN 3640200.2 AND ENCL 2 OF REF B, LISTS THE FOLLOWING SPECIFIC VERBATIM REASON(S) AS STATED IN MILPERSMAN FOR PROCESSING: [FILL IN -- SEE ENCL (15) OF NMPCINST 1910.1D). NO ABBREVIATIONS.] SNM WAS AFFORDED ALL RIGHTS IAW PARA 4 OF ENCL 3 TO REF B. [THIS PARAGRAPH SHOULD MIRROR THE LETTER OF NOTIFICATION EXACTLY]

8. SNM WAS ADVISED OF RIGHT TO CONSULT WITH COUNSEL BEFORE MAKING DECISION TO REQUEST OR WAIVE RIGHTS. SNM (DID/DID NOT) CONSULT WITH COUNSEL. [PROVISIONS MILPERSMAN 3640200.2C PERTAIN.]

9. STATEMENT OF AWARENESS DTD (FILL IN), EXECUTED IAW MILPERSMAN 3640200.4, AND ENCL 3 TO REF B INCLUDES VERBATIM

REASON(S) FOR PROCESSING AS LISTED IN PARA 7, ABOVE. SNM REQUESTED FOLLOWING RIGHTS: [LIST ALL RIGHTS ELECTED]. SNM WAIVED ALL OTHER RIGHTS.

10. [IF SNM HAS SIX OR MORE YEARS MILITARY SERVICE] SNM WAIVED RIGHT TO PRESENT CASE BEFORE ADMIN BOARD.

11. SNM (DID/DID NOT) ELECT TO MAKE A WRITTEN STATEMENT. SNM'S STATEMENT [IF ELECTED] IS QUOTED VERBATIM AS FOLLOWS:

12. [IF APPLICABLE] PSYCHIATRIC OR MEDICAL EVALUATION AS FOLLOWS: [BRIEFLY LIST PERTINENT FINDINGS, DIAGNOSIS, RECOMMENDATION(S), AND, IF ALCOHOL/DRUG INVOLVEMENT INDICATED, REGARDLESS OF REASON(S) PROCESSED, ADVISE IF MEMBER ALCOHOL/DRUG DEPENDENT. IF PROCESSED FOR PERSONALITY DISORDER, ADVISE IF MEMBER CONSIDERED A DANGER TO SELF OR OTHERS.] MEDICAL OFFICER SIGNED EVALUATION ON (DATE), NAME OF HOSPITAL. EVALUATION INDICATED SNM (IS/IS NOT) DRUG DEPENDENT. SNM (IS/IS NOT) RECOMMENDED FOR FURTHER SERVICE BY MEDICAL OFFICER.

13. MOST RECENT PG 13 ISSUED BY PARENT, PROCESSING COMMAND: [PROVIDE REGARDLESS OF REASON FOR PROCESSING. A PG 13 IS ONLY REQUIRED FOR PROCESSING FOR MISCONDUCT DUE TO A PATTERN OF MISCONDUCT OR DUE TO MINOR DISCIPLINARY INFRACTIONS, CONVENIENCE OF THE GOVERNMENT DUE TO PERSONALITY DISORDER, ENTRY LEVEL PERFORMANCE AND CONDUCT, OR UNSATISFACTORY PERFORMANCE. DO NOT INTERPRET THIS PARAGRAPH TO MEAN THE COMMAND MUST HAVE COUNSELED MEMBER BEFORE PROCESSING FOR ANY OTHER REASON(S), NOR TO MEAN MEMBER MUST NOW BE GIVEN PG

13. IF NONE, SO STATE.]

14. COMMENTS AND RECOMMENDATION OF CO: [IF MEMBER PROCESSED FOR ENTRY LEVEL PERFORMANCE AND CONDUCT, UNSATISFACTORY PERFORMANCE, OR MISCONDUCT DUE TO MINOR DISCIPLINARY INFRACTIONS, CONFIRM COUNSELING REQUIREMENT MET LAW MILPERSMAN 3630200, 3630300 OR 3630600 AS APPROPRIATE AND INDICATE DATE MOST RECENT PAGE 13 COUNSELING AND WARNING ENTRY SIGNED BY MEMBER. SHOULD BE THE SAME AS PARA 13. STATE HOW THE COUNSELING/WARNING ENTRY WAS VIOLATED. IF SEPARATION IS RECOMMENDED, MAKE SPECIFIC RECOMMENDATION AS TO CHARACTERIZATION OF DISCHARGE.]

15. COPIES OF THE NOTICE OF NOTIFICATION PROCEDURE PROPOSED ACTION, STMT OF AWARENESS AND ALL SUPPORTING DOCUMENTATION WILL BE FORWARDED IN 15 WORKING DAYS TO NMPC 8322, NMPC 2422, NMPC 243, OR NMPC 2E IAW PARA 21C OF ENCL 1 TO REF B.

16. POC FOR DISCUSSION OF THIS CASE IS (FILL IN NAME, RANK, BILLET): AUTOVON NO: (FILL IN). STATE LOCATION OF SNM IF TRANSFERRED TAD SUBSEQUENT TO COMPLETION OF CASE PROCESSING.

(INCLUDE AS INFO ADDEE.)

17. UIC (LOCATION OF SNM)

18. CO SENDS [COMMANDING OFFICERS SHOULD ENSURE COMPLETENESS OF SUBMISSIONS. OMISSIONS WILL RESULT IN UNNECESSARY DELAYS OR REPROCESSING]

APPOINTING LETTER
[NAVMILPERSCOMINST 1910.1D, encl(11)]

[Although a Navy form, this letter meets USMC requirements.]

(LETTERHEAD)

25 Feb CY

From: Commander, Naval Education and Training Center, Newport, Rhode Island

To: Lieutenant Commander Eli Whitney, USN

[O-4 line officer, if available, mandatory. Senior member must be active list officer if respondent is active duty. O-4 TAR can be used.]

Subj: APPOINTMENT OF ADMINISTRATIVE BOARD

Ref: (a) MILPERSMAN, art. 3640300
(b) MILPERSMAN, art. 3640350
[USMC reference: MARCORSEPMAN, ch. 6, § 3, part C.]

1. Per references (a) and (b), an administrative board consisting of yourself as senior member and President and of Lieutenant Samuel Gompers, USNR, and Ensign Vera Miles, USN, is hereby appointed to conduct a hearing in the case of YNSR Ellen Anna Doe, USNR, 012-34-5678, who is being processed for administrative discharge by reason of misconduct due to drug abuse, misconduct due to a pattern of misconduct, misconduct due to the commission of a serious offense, and misconduct due to a civilian conviction.

[At least one Reserve-officer member mandatory for reservist respondent. All officer members required when OTH is authorized for reservist respondent.]

2. General procedural instructions, as well as instructions for the conduct of the hearing and submission of the board's report, are outlined in reference (b) and shall be followed. The Board is directed to make findings of fact relative to the specific reason(s) the respondent is being processed and to make a recommendation with respect to final action of retention, separation or suspension and to characterization of service or description of separation. The report of the Board shall be signed by all members. The dissent of any member shall be duly recorded in the board report. [Indicate multiple reasons where appropriate]

3. Lieutenant Junior Grade Hamilton Burger, JAGC, USN, is appointed to act as recorder for the board.

4. Lieutenant Idona Mibest, JAGC, USNR, a lawyer certified in accordance with Article 27(b), Uniform Code of Military Justice, is appointed to act as counsel for the respondent.

5. The Board shall convene at 0900, 01 March CY, Naval Education and Training Center, Newport, Rhode Island, or as soon thereafter as practicable.

/s/ _____

[Signature of CA or acting CA, not "By direction."]

Copy to:

LT Gompers, member

ENS Miles, member

LTJG Burger, recorder

LT Mibest, counsel for respondent

YNSR Doe, respondent

NOTICE OF ADMINISTRATIVE BOARD (USN)
[MILPERSMAN, art. 3640300.6, NMPCINST 1910.1D, encl(6)]

[LETTERHEAD]

25 Feb CY

From: Commander, Naval Education and Training Center
To: YNSR Ellen A. Doe, USNR, 012-34-5678

Subj: NOTICE OF AN ADMINISTRATIVE BOARD PROCEDURE
PROPOSED ACTION

Ref: (a) MILPERSMAN, art. 3630600
(b) MILPERSMAN, art. 3630620
[List references for all grounds.]

1. Per references (a) and (b), you are being considered for an administrative discharge from the naval service by reason of misconduct due to a pattern of misconduct, misconduct due to drug abuse, misconduct due to the commission of a serious offense(s), and misconduct due to a civilian conviction, as evidenced by your service record, by (1) action tantamount to a conviction for shoplifting in Newport, Rhode Island Superior Court on 15 Jan CY, and/or (2) a positive urinalysis (THC) of 25 Jan CY.

[List the general grounds and circumstances for each basis. This must match the Statement of Awareness.]

2. If separation is approved by Commander, Naval Military Personnel Command, it will result in: Discharge. [Indicate the type of separation contemplated, including discharge, RAD, etc.]

3. If separation is approved, the characterization of your service may be under other than honorable conditions.

4. You are entitled to the following rights and privileges:

a. The right to consult with counsel prior to electing or waiving any of the afforded rights.

b. The right to obtain copies of documents that will be forwarded to Commander, Naval Military Personnel Command supporting the basis of the recommended separation. (Classified documents may be summarized.)

c. The right to request an administrative board.

d. The right to present written statements in your own behalf either verbally or in writing to the board, or in writing if an administrative board is not convened.

YNSR ELLEN ANNA DOE, USNR 012-34-5678

Subj: NOTICE OF AN ADMINISTRATIVE BOARD PROCEDURE PROPOSED ACTION

[Respondent's full name, rate, and SSN required on each page of case per NAVMILPERSCOMINST 1910.1D, Encl (1), para. 18.]

e. The right to representation at the administrative board by qualified counsel.

f. The right to representation at the administrative board by civilian counsel at your own expense.

g. The right to waive any or all of the above rights after being afforded a reasonable opportunity to consult with counsel. (Failure to respond shall constitute a waiver of the above rights. Failure to appear without good cause at a hearing constitutes waiver of the right to be present at the hearing.)

h. The right to a minimum of two working days to respond to this notice. Failure to respond will result in a waiver of all rights. Maximum time to respond will be 5 working days from receipt of this notice unless an extension is granted. [Should also indicate the maximum time to respond.]

5. You are advised that, should you begin a period of unauthorized absence following delivery of this notice, the separation processing in your case will proceed in your absence or it may be held in abeyance until you return to military control and appropriate disciplinary action is taken on the absence. You are further advised that your unauthorized absence will be considered a waiver of your right to appear personally before the administrative board if the separation processing is not held in abeyance. Your unauthorized absence could also result in termination of administrative action and your being declared a deserter.

[See MILPERSMAN and NAVMILPERSCOMINST 1910.1D for additional paragraphs if the respondent is in civil confinement or is a reservist not on active duty.]

/s/ _____
[Signature of CO or other authorized person "By direction."]

FIRST ENDORSEMENT

From: YNSR Ellen A. DOE, USNR, 012-34-5678
To: Commander, Naval Education and Training Center, Newport, RI

1. I have received the above letter and I understand its contents.

/s/_____
Ellen A. Doe signature/Date delivered

STATEMENT OF AWARENESS (USN)

[MILPERSMAN, art. 3640300.7, NAVMILPERSCOMINST 1910.1D, encl(7)]

27 Feb CY

[If the date is less than two working days from notice, ensure respondent checks the time waiver in paragraph 4.]

From: YNSR Ellen A. DOE, USNR, 012-34-5678
To: Commander, Naval Education and Training Center, Newport, RI

Subj: STATEMENT OF AWARENESS AND REQUEST FOR, OR WAIVER OF,
PRIVILEGES

Ref: (a) COMNETC, Newport, RI ltr of 25 Feb CY
(b) MILPERSMAN, art. 3630600
(c) MILPERSMAN, art. 3630620

1. I understand that I am being considered for an administrative separation from the naval service which could result in an other than honorable discharge by reason of misconduct due to a pattern of misconduct, misconduct due to drug abuse, misconduct due to the commission of a serious offense, and misconduct due to a civilian conviction, as evidenced by my service record, by (1) action tantamount to conviction for shoplifting in Newport Superior Court on 15 Jan CY, and/or (2) a positive urinalysis (THC) of 25 Jan CY.

[List the general grounds and circumstances for each basis; this must match the letter of notification.]

2. I understand that if such separation is under other than honorable conditions, it may deprive me of virtually all veterans' benefits based upon my current period of active service, and that I may expect to encounter substantial prejudice in civilian life in situations wherein the type of service rendered in any branch of the Armed Forces or the character of discharge received therefrom may have a bearing. I further understand that if an Other-Than-Honorable discharge is not directed, the characterization of my discharge, if based on misconduct or defective enlistment and induction due to fraudulent entry into naval service, will be General, or if not based on misconduct or defective enlistment and induction due to fraudulent entry into naval service, the character will be based on my naval service or, if appropriate, an entry level separation will be directed.

[Respondent's full name, rate, and SSN required on each page of case per NAVMILPERSCOMINST 1910.1D, Encl (1), para. 18.]

3. I have been afforded an opportunity to consult with counsel and I: (check as appropriate)

- ☐ did consult with counsel
- ☐ did not desire to consult with counsel

4. I have been afforded and elect the following rights:

☐ The right to obtain copies of documents that will be forwarded to Commander, Naval Military Personnel Command, supporting the basis of the recommended separation. (Classified documents may be summarized.)

☐ The right to request an administrative board.

☐ The right to submit statements in my own behalf either verbally or in writing before an administrative board or in writing if an administrative board is not convened.

☐ The right to representation at the administrative board by qualified counsel.

☐ The right to representation at the administrative board by civilian counsel at my own expense.

☐ The right to waive all the above.

☐ I have waived the minimum two working days to respond to the notice of the administrative board procedure proposed action.

5. I acknowledge and understand that the administrative board that I have elected may consider nonjudicial punishments, courts-martial convictions, and civil convictions occurring up to the announcement of the findings and recommendation of the board in determining retention or separation and the characterization of any discharge to be awarded. I understand further, that if an administrative board is not convened, such punishments or convictions may be considered by the separation authority in determining retention or separation, and if a discharge is approved, the characterization of that discharge.

/s/ _____

/s/ _____/ _____

Witnessed by:
IDONA MIBEST
LT, JAGC, USNR

ELLEN A NNA DOE Date
YNSR, USNR

NOTICE OF ADMINISTRATIVE BOARD (USMC)
[MARCORSEPMAN, fig. 6-3]

[LETTERHEAD]

25 February 19CY

From: Commanding Officer
To: Private Ellen A. Doe 012 34 5678 USMCR

Subj: NOTIFICATION OF SEPARATION PROCEEDINGS

Ref: (a) MCO 1900.16D (MARCORSEPMAN)

Encl: (1) Acknowledgement of respondent's rights
(2) Purpose and scope of the NDRB and BCNR

1. You are hereby notified that I intend to recommend to the Commanding General, [insert appropriate separation authority] that you be discharged [indicate whether discharge or RAD] from the U.S. Marine Corps per paragraphs 6210.3 and 6210.5 of the reference [list paragraph for each ground] by reason of misconduct due to drug abuse, misconduct due to a pattern of misconduct, misconduct due to the commission of a serious offense, and misconduct due to a civilian conviction.

2. The bases for this recommendation are: Misconduct due to a pattern of misconduct as evidenced by NJP's of 21 Mar-1, 26 Jul-1, and 17 Feb CY, SPCM of 07 Oct-1, and action tantamount to conviction for shoplifting in Newport Superior Court on 15 Jan CY; misconduct due to drug abuse as evidenced by NJP of 26 July-1 for possession of drug paraphernalia and positive urinalysis (THC) of 25 Jan CY; by reason of misconduct due to the commission of a serious offense as evidenced by assault on a petty officer (SPCM of 07 Oct-1), and disrespect to a commissioned officer (NJP of 17 Feb CY); and misconduct due to a civilian conviction as evidenced by an action tantamount to conviction for shoplifting in Newport Superior Court on 15 Jan CY. [List the circumstances for each ground; this must match the Statement of Awareness].

3. The least favorable characterization of service which you may receive is under other-than-honorable conditions. Although the Commanding General [insert appropriate separation authority] will make the determination of characterization if you are separated, I am recommending you receive an other than honorable discharge.

4. As a result of these separation proceedings, you have the following rights:

a. You have the right to consult with qualified counsel prior to electing or waiving any of your rights. It is in your best interest to do so prior to waiving any of your rights.

b. You have the right to request a hearing before an administrative discharge board per paragraph 6304 of the reference.

c. You have the right to present written statements to the Commanding General [separation authority] in rebuttal to this proposed separation and in lieu of having a hearing.

d. You have the right to obtain copies of documents that will be forwarded to the Commanding General [separation authority] supporting this proposed separation. Classified documents shall be summarized.

e. You have the right to waive any of these rights after being afforded an opportunity to consult with counsel.

5. Should you request a hearing before an administrative discharge board, you would be afforded the following rights:

a. To appear in person before such a board or be represented by counsel if confined by civil authorities.

b. To be represented by military counsel: appointed; or of your own choice, if available.

c. To be represented by civilian counsel if you desire and at your own expense.

d. To challenge voting members of the board or the legal advisor, if any, for cause only.

e. To testify in your own behalf, subject to the provisions of Article 31, UCMJ. (Compulsory self-incrimination prohibited.)

f. At any time during the proceedings you or your counsel may submit written or recorded matter for consideration by the board.

g. You or your counsel may call witnesses on your behalf.

h. You or your counsel may question any witness who appears before the board.

i. You or your counsel may present argument prior to the board's closing the hearing for deliberations on findings and recommendations.

j. Upon written request to the Commanding General [insert convening authority], to be provided with a copy of the report of the board and the endorsement thereon.

k. Failure to appear without good cause at a hearing constitutes waiver of your right to be present at the hearing.

l. You have the right to make a sworn or unsworn statement.

m. You have the right to examine evidence presented by the board, to cross-examine witnesses appearing before the board, to submit evidence before the board, and to present final argument before the board.

n. Failure to respond after being afforded a reasonable opportunity to consult with counsel constitutes waiver of the rights in paragraphs 6304.1d to 1m of the reference.

6. Information on the purpose and scope of the NDRB and BCNR is provided to you as enclosure (2).

7. You are directed to respond in writing to this notice not later than 1600, 2 March 19cy by completing and returning enclosures (1) and (2). [Must allow a minimum of two working days.] Failure to respond by the prescribed time constitutes a waiver of your rights.

[See MARCORSEPMAN, paragraph 6304.2 for additional paragraphs if respondent is in civil confinement, UA, or is a reservist NOT on active duty.]

/s/ _____
(Signature of CO or acting CO.)

Copy to:

Commanding General, [separation authority per MARCORSEPMAN, 6304.]

FIRST ENDORSEMENT [See sample above]

STATEMENT OF AWARENESS (USMC)
[MARCORSEPMAN, fig. 6-3]

27 Feb 19CY

From: Private Ellen A. Doe 012 34 5678 USMCR
To: Commanding Officer

Subj: ACKNOWLEDGEMENT OF MY RIGHTS TO BE EXERCISED OR
WAIVED IN SEPARATION PROCEEDINGS

Ref: (a) CO's ltr of 25 February 19CY

Encl: (1) Purpose and Scope of NDRB AND BCNR

1. _____ I acknowledge receipt of the reference notifying me of proceedings to discharge me by reason of misconduct due to a pattern of misconduct as evidenced by NJP's of 21 Mar-1, 26 Jul-1, and 17 Feb CY, SPCM of 07 Oct-1, and action tantamount to conviction for shoplifting - Newport Superior Court, 15 Jan CY; by reason of misconduct due to drug abuse as evidenced by NJP of 26 Jul-1 for possession of drug paraphernalia and positive urinalysis (THC) of 25 Jan CY; by reason of misconduct due to the commission of a serious offense as evidenced by assault on a petty officer (SPCM of 07 Oct-1), and disrespect to a commissioned officer (NJP of 17 Feb CY); and misconduct due to a civilian conviction as evidenced by an action tantamount to conviction for shoplifting in Newport Superior Court on 15 Jan CY. [List general grounds and specific circumstances for each basis; must match the Letter of Notification.]

2. _____ I understand that I am being recommended for separation under other than honorable conditions and that the least favorable characterization which I may receive is an Other Than Honorable discharge. [Indicate recommended character of separation.]

3. _____ In view of the above, I choose to execute the following rights:

_____ a. I (have)(have not) consulted with counsel. I realize it is in my best interests to do so prior to exercising or waiving any of my rights. Counsel's name is: LT Idona Mibest, JAGC, USNR.

_____ b. I (do)(do not) request a hearing before an administrative discharge board.

_____ c. In lieu of hearing, I (have)(have not) included written statements in rebuttal to this proposed separation.

_____ d. I (do)(do not) desire to obtain copies of documents that will be forwarded to the Commanding General [insert appropriate separation authority] supporting this proposed discharge.

4. _____ If I requested a hearing before an administrative discharge board, I realize I have the following rights:

_____ a. To be present or represented by counsel if confined by civil authorities.

_____ b. To be represented by military counsel, appointed or of my choice, if available.

_____ c. To be represented by civilian counsel if I desire and at my own expense.

_____ d. To challenge voting members of the board or the legal advisor, if any, for cause only.

_____ e. To testify in my own behalf, subject to the provisions of Article 31, UCMJ. (Compulsory self-incrimination prohibited.)

_____ f. At any time during the proceedings I or my counsel may submit recorded matter for consideration by the board.

_____ g. I or my counsel may call witnesses on my behalf.

_____ h. I or my counsel may question any witness who appears before the board.

_____ i. I or my counsel may present argument prior to the board's closing the hearing for deliberations on findings and recommendations.

_____ j. Upon written request to the [convening authority], to be provided with a copy of the report of the board and the endorsement thereon.

_____ k. Failure to appear without good cause at a hearing constitutes waiver of my right to be present at the hearing.

5. _____ I have read and fully understand the purpose and scope of NDRB and BCNR. Enclosure (1) is returned.

/s/ _____
Signature of respondent

Witnessed by: [Signature of counsel for respondent]

RECORD OF PROCEEDINGS
(MILPERSMAN, art. 3640350.6)
(MARCORSEPMAN, para. 6320)

[Respondent's full name, rate, and SSN required on each page of case.
NMPCINST 1910.1D, enclosure (1), para. 18]

PROCEEDINGS OF ADMINISTRATIVE BOARD

Held on board Naval Education and Training Center, Newport, R. I.

on 01 March 19CY

In the case of

YNSR ELLEN ANNA DOE, USNR, 012-34-5678

1. On 01 March 19CY on board Naval Education and Training Center (NETC) located at Newport, Rhode Island, an administrative board was conducted for the purpose of considering pertinent facts in the case of subject member who was being considered for administrative separation from the U.S. Naval Reserve by reason of alleged misconduct due to drug abuse, misconduct due to a pattern of misconduct, misconduct due to the commission of a serious offense, and misconduct due to a civilian conviction.

[The board's findings and recommendations must be verbatim; everything else may be summarized. No official format has been promulgated.]

2. The board was conducted in compliance with the provisions of [the Naval Military Personnel Manual (MILPERSMAN) and of NAVMILPERSCOMINST 1910.1D][MARCORSEPMAN ch. 6, § 3, part C]. The board was convened by order of Commander, Naval Education and Training Center, dated 25 February 19CY (exhibit 1 hereto). Exhibit 2 is a copy of the letter of notification. Exhibit 3 is the statement of awareness executed by respondent. [Exhibits 1, 2, and 3 are required for both Navy and Marine boards.]

3. The board was called to order at 0900, 01 June 19CY. [Note opening and closing times for all board sessions.] Present were: LCDR Eli Whitney, USN, President; LT Samuel Gompers, USNR, member; ENS Vera Miles, USN, member;

YNSR Ellen A. Doe, USNR, respondent; LTJG Hamilton Burger, JAGC, USN, recorder; and LT Idona Mibest, JAGC, USNR, counsel for respondent. All parties indicated that they were ready to proceed. Both counsel for respondent and the the recorder indicated that they were

YNSR ELLEN ANNA DOE, USNR 012-34-5678

considered lawyers in the sense of Article 27(b), UCMJ. [Identify all persons present and legal qualifications of recorder, counsel, and legal advisor, if appointed.]

4. The respondent was fully advised of her rights as provided in the MILPERSMAN and NAVMILPERSCOMINST 1910.1D, and she indicated that she had no questions concerning them.

5. The recorder and counsel for the respondent questioned the board members regarding their ability to act in this case. Neither the recorder nor the counsel for the respondent had challenge for cause against any member of the board.

[If any challenge is made, indicate by whom, the grounds, and the results. For Navy boards, the convening authority decides challenges to members. For Marine boards, the board votes on the challenge. Identify any new replacement members and attach any modifications to the convening order.]

6. The recorder and counsel for respondent each made an opening statement.

7. In addition to exhibits 1 through 3, the recorder offered the following documents for consideration by the board:

- | | |
|------------|--|
| Exhibit 4 | Service record page 9(2) |
| Exhibit 5 | Service record page 601-7R
submitted -1 Mar 22 (NJP of -1 Mar 21) |
| Exhibit 6 | Service record page 601-7R
submitted -1 Jul 30 (NJP of -1 July 26) |
| Exhibit 7 | Service record page 13, counseling/warning of
26 Jul -1 |
| Exhibit 8 | Service record page 601-7R
submitted -1 Oct 14 (SPCM of -1 Oct 07) |
| Exhibit 9 | Certified copy of Newport County Superior Court
disposition #000-000 of 15 Jan CY with copy of General
Laws of Rhode Island 11-41-20 |
| Exhibit 10 | Service record page 601-7R submitted |

CY Feb 21 (NJP of CY Feb 17)

YNSR ELLEN ANNA DOE, USNR 012-34-5678

Exhibit 11 Competence-for-duty examination of 25 Jan CY

Exhibit 12 NAVREGMEDCEN Portsmouth, VA 152345Z Feb CY
(laboratory confirmation)

[Per OPNAVINST 5350.4 and MCO P5300.12, neither exhibit 11 nor 12 can be used to characterize the separation]

Exhibit 13 Performance evaluation 23 Feb -1 to
26 Mar -1

Exhibit 14 Performance evaluation 27 Mar -1 to
30 Jun -1

Exhibit 15 Performance evaluation 1 Jul -1 to
31 Jan CY

Exhibit 16 Service record enlisted classification record

Exhibit 17 Service record page 601-7R submitted
-3 Jun 29 (NJP of- 3 Jun 29)

The recorder noted that exhibits 11 and 12 could be considered only as to the issue of drug abuse and retention or separation, but not as to the issue of characterization. [Specifically mention any limitations on the use of evidence, e.g., urinalysis results, prior enlistment misconduct, etc.] Counsel for respondent indicated that she objected to all exhibits as being hearsay. Counsel for respondent also objected to exhibits 5, 6, and 10 as failing to indicate compliance with United States v. Booker. Counsel for respondent further objected to exhibits 4, 5, 6, 7, 8, 10, 11, and 12 as failing to properly reflect compliance with Article 1110, U.S. Navy Regulations. [Identify all objections noted for the record.] The President overruled all objections, noted the objections for the record, and accepted all exhibits. The recorder indicated that he had nothing further to present. The board recessed at 0940.

8. The board reassembled at 1000. All parties were again present. The respondent indicated that she understood her rights concerning the presentation of evidence in her behalf. Counsel for respondent called BMC Larry Roland, USN, Naval Education and Training Center, Newport, R.I., who was duly sworn and whose testimony is summarized in exhibit A. [Attach summaries of the testimony of each witness or, as NMPC prefers, summarize the testimony in the record itself.]

YNSR ELLEN ANNA DOE, USNR 012-34-5678

9. Counsel for respondent had previously requested in writing the presence of LCDR J. R. Jackson, currently stationed at the Transient Personnel Unit, Great Lakes, Illinois (exhibit 17). The written denial thereof by the convening authority is attached as exhibit 18. Counsel for respondent first stated her objection to the denial of LCDR Jackson's personal appearance, then introduced a stipulation of expected testimony of LCDR Jackson as exhibit B.

[Attach any communications regarding production of witnesses. The CA's denial should articulate the key facts and reasoning for the decision.]

10. Counsel for respondent next indicated that the respondent desired to make a sworn statement and would voluntarily subject herself to examination by the board and the recorder. Prior to receiving this evidence, the respondent was provided a Privacy Act statement (exhibit C-1). [A Privacy Act statement is necessary if the respondent will be asked to provide information by the recorder or members.] Respondent was then duly sworn, and her testimony is summarized in exhibit C-2. Counsel for respondent indicated she had nothing further to present. The board recessed at 1045.

11. The board reassembled at 1055. All parties who were present when the board recessed were again present. In rebuttal, the recorder called ENS Chester D. Carter, USN, Naval Education and Training Center, who was duly sworn and whose testimony is summarized in exhibit 19. The recorder provided the board with a description of the benefits associated with various administrative separations, which was received as exhibit 20. Counsel for the respondent indicated that she had no objection to exhibit 20, providing that the board was advised that there may be other disadvantages associated with general and other than honorable condition discharges (such as difficulty in securing employment, etc.). The recorder agreed and the board was so advised. The recorder provided the board with a findings and recommendations worksheet which is attached as exhibit 21. [Insert additional paragraphs as required to reflect all significant matters.]

12. The recorder and counsel for respondent both indicated they had nothing further to present. The recorder made opening argument. Counsel for respondent made closing argument. The recorder made closing argument.

YNSR ELLEN ANNA DOE, USNR 012-34-5678

13. The board was reopened at 1149. The recorder, the respondent, and counsel for respondent returned to the board room. The board announced the following:

FINDINGS OF THE BOARD: The board, by unanimous vote finds that the respondent did commit misconduct due to drug abuse, misconduct due to a pattern of misconduct, misconduct due to the commission of a serious offense, and misconduct due to a civilian conviction. The board specifically finds by a preponderance of the evidence:

1. That the respondent wrongfully possessed drug paraphernalia on board Naval Education Training Center on -1 Jul 19 and wrongfully used marijuana (or a derivative thereof) while on liberty on 22-24 Jan 19CY; that respondent has exhibited a pattern of discreditable involvement with military and civilian authorities as evidenced by: NJP's of -1 Mar 21, -1 Jul 26, and CY Feb 17; SPCM of -1 Oct 07; and Newport County Superior Court action tantamount to a conviction for shoplifting adjudged 15 Jan CY; and that on 26 Jul -1 respondent was properly counseled and warned of the consequences of continued misconduct but violated the warning. [Findings should include a complete summary of the facts and circumstances surrounding each allegation.]

2. That each allegation set forth in the notice of proposed separation is supported by a preponderance of the evidence.

3. That, under the guidance in the Naval Military Personnel Manual concerning the specific reasons for separation, the board has determined:

- a. That the findings warrant separation for misconduct due to drug abuse.
- b. That the findings warrant separation for misconduct due to a pattern of misconduct.
- c. That the findings warrant separation for misconduct due to the commission of a serious offense.
- d. That the findings warrant separation for misconduct due to a civilian conviction.

[The board must make a separate determination for each basis for separation.]

YNSR ELLEN ANNA DOE, USNR 012-34-5678

RECOMMENDATIONS OF THE BOARD: The board, by 2/3 vote, recommends separation under other than honorable conditions by reason of misconduct due to drug abuse, misconduct due to a pattern of misconduct, misconduct due to the commission of a serious offense, and misconduct due to a civilian conviction. The board unanimously recommends that the discharge not be suspended. The board does not recommend transfer to the Individual Ready Reserve.

NOTE: The board specifically notes that it considered exhibits 16 and 17 only on the issues of retention or separation, and not on the issues of the misconduct due to a pattern of misconduct and characterization. Exhibits 11 and 12 were considered in establishing misconduct due to drug abuse and on retention or separation, but not on characterization. [The board should specifically comment on the limited use of any evidence.]

The board adjourned at _____, 01 March 19CY.

AUTHENTICATED THIS _____ DAY OF _____, 19CY.

(signature)
ELI WHITNEY
LCDR, USN
President

(_____ USMC ONLY _____)
(signature)
HAMILTON BURGER
LTJG, JAGC, USN
Recorder

USE "A" OR "B" FOLLOWING

"A" (Navy or Marine Corps)

REVIEWED BY COUNSEL FOR RESPONDENT THIS ____ DAY OF _____, 19CY.

I have examined the summary of testimony of all witnesses heard and all supporting documents included in the record of proceedings and I:

_____ agree with the summarization and/or documents.

_____ do not agree with the summarization and/or documents included,
and I have included a statement of deficiencies for the record.

IDONA MIBEST
LT, JAGC, USNR
Counsel for the Respondent

-OR-

"B" (Navy option only)

Reviewed by counsel for the respondent: LT IDONA MIBEST, JAGC, USNR, per NMPC MSG 051927Z JUN 86, para. 5A (NAVOP 058/86); counsel for the respondent was mailed a copy of the record of proceedings, summarized testimony of all witnesses, and exhibits on _____, 19CY, in lieu of receiving and signing the transcript of the board. Counsel for the respondent was told that, if any rebuttal to the board was desired, it should be sent directly to Commander, Naval Military Personnel Command (Code 8322), Washington, DC 20370-5322, making the Commander, Naval Education and Training Center, a "Copy to" addressee.

LAST PAGE OF "RECORD"

REPORT OF ADMINISTRATIVE BOARD

Report of Administrative Board held at NETC, Newport, RI, on 01 March CY, in the case of YNSR Ellen Anna Doe, USNR, 012-34-5678

FINDINGS OF THE BOARD: The board by unanimous vote finds that the respondent did commit misconduct due to drug abuse, misconduct due to a pattern of misconduct, misconduct due to the commission of a serious offense, and misconduct due to a civilian conviction. The board specifically finds by a preponderance of the evidence:

1. That the respondent wrongfully possessed drug paraphernalia on board Naval Education and Training Center on -1 Jul 19 and wrongfully used marijuana (or a derivative thereof) while on liberty on 22-24 Jan 19CY; that respondent has exhibited a pattern of discreditable involvement with military and civilian authorities as evidenced by: NJP's of -1 Mar 21, -1 Jul 26, and CY Feb 17; SPCM of -1 Oct 07; and Newport County Superior Court action tantamount to a conviction for shoplifting adjudged 15 Jan CY; and that on 26 Jul -1 respondent was properly counseled and warned of the consequences of continued misconduct but violated the warning. [Findings should include a complete summary of the facts and circumstances surrounding each allegation.]

2. That each allegation set forth in the notice of proposed separation is supported by a preponderance of the evidence.

3. That, under the guidance in the Naval Military Personnel Manual concerning the specific reasons for separation, the board has determined:

- a. That the findings warrant separation for misconduct due to drug abuse.
- b. That the findings warrant separation for misconduct due to a pattern of misconduct.
- c. That the findings warrant separation for misconduct due to the commission of a serious offense.
- d. That the findings warrant separation for misconduct due to a civilian conviction.

[The board must make separate determinations for each reason.]

Page One of Report

REPORT OF ADMINISTRATIVE BOARD

Report of Administrative Board held at NETC, Newport, RI, on 01 March CY, in the case of YNSR Ellen Anna Doe, USNR, 012-34-5678

RECOMMENDATIONS OF THE BOARD: The board, by 2/3 vote, recommends separation under other than honorable conditions by reason of misconduct due to drug abuse, misconduct due to a pattern of misconduct, misconduct due to the commission of a serious offense, and misconduct due to a civilian conviction. The board unanimously recommends that the discharge not be suspended. The board does not recommend transfer to the Individual Ready Reserve.

NOTE: The board specifically notes that it considered exhibits 16 and 17 only on the issue of retention or separation, and not on the issues of the misconduct due to a pattern of misconduct and/or characterization. Exhibits 11 & 12 were considered in establishing misconduct due to drug abuse and on retention or separation, but not on characterization. The board adjourned at 1150.

(signature)	(signature)	(signature of
ELI WHITNEY	SAMUEL GOMPERS	member if
LCDR, USN	LT, USNR	unanimous)
President	Member	

[If unanimous, all three members sign above. Any dissent should be detailed verbatim and signed by the dissenter.]

DISSENT: Although I agree with all other findings and recommendations of the board, it is my recommendation that the character of separation be GENERAL in view of the extenuating circumstances reflected in exhibit C.

(Signature)
VERA MILES
ENS, USN
Member

Page Two of Report

REPORT OF ADMINISTRATIVE BOARD

Report of Administrative Board held at NETC, Newport, RI, on 01 March CY, in the case of YNSR Ellen Anna Doe, USNR, 012-34-5678

Authentication by Senior Member this ____ day of _____, 19CY

(Signature)

ELI WITNEY

LCDR, USN

Senior Member

Authentication by Counsel for the Respondent this ____ day of _____, 19__:
I (do) (do not) agree with the findings and recommendations as stated above. I (will) (will not) submit a statement of deficiencies within ____ working days. These decisions are separate from my review of the summary of testimony of all witnesses heard and all supporting documents included in the record of proceedings. A decision to make a statement as to the record will be made after I have read it.

/s/ _____

IDONA MIBEST

LT, JAGC, USNR

Counsel for the Respondent

Page Three of Report

CONDITIONAL WAIVER FORMAT
(USMC ONLY)

Rate, Name, SSN

Activity

Date

I, _____, the respondent, being considered for an Administrative Board proceeding, do hereby certify that:

a. Provided I am recommended for a general discharge, I waive the Administrative Board to which I am entitled and have elected.

b. I understand if this agreement is accepted, and the Commanding General [Separation Authority] authorizes my discharge, such discharge shall be a general discharge.

c. I understand that a general discharge may deprive me of certain veterans' benefits based upon my current period of active service and that I may expect to encounter substantial prejudice in civilian life in situations wherein the type of service rendered in any branch of the Armed Forces, or the character of character of discharge received may have a bearing.

d. My qualified counsel has fully advised me of the meaning and effect of this conditional waiver and I fully understand and comprehend the meaning thereof and all of its attendant effects and consequences. I am satisfied with my counsel. This offer to waive my right to an administrative board originated with me and my lawyer counsel. I enter into this conditional waiver free from duress or other promises of any kind. I have asked my counsel to witness my signature.

e. [If applicable, add the following statement:] In view of the above, I no longer desire to submit a statement.

(Signature of respondent)

Witnessed by

(Signature of counsel, state licensed)

SAMPLE LETTER OF TRANSMITTAL FORMAT
ADMINISTRATIVE BOARD PROCEDURE

From: Commanding Officer, _____(UIC)

To: Commander, Naval Military Personnel Commander (NMPC-83)

Subj: (RATE, NAME OF MEMBER, USN(R), SSN); RECOMMENDATION FOR
SEPARATION DUE TO [INDICATE APPROPRIATENESS CITED IN THE
MILPERSMAN AND THE SPECIFIC ARTICLE NUMBER(S)]

Ref: (a) MILPERSMAN _____

Encl: (1) Copy of notice of administrative board procedure
proposed action

(2) Signed statement of awareness and request for or
waiver of rights

(3) Statement of member, if one is submitted.

(4) Copy of page 9, with final trait averages

(5) Information concerning arrest, conviction, or
disposition (include civil document if available), if
applicable

(6) Other pertinent documentation (include most recent
counseling/warning entry, if executed) (if drug
alcohol/abuse current medical dependency evaluation
subsequent to most recent incident occurring within
past six months.)

(7) Proceedings of Administrative Board, if applicable

(8) Appointing letter for nonlawyer counsel, if applicable

1. Per reference (a), the following information is submitted:

a. Reason for processing [one or more reasons].

b. Basic record data: Date of current enlistment: (date) for (fill in) years;
EAOS: (fill in); marital status: (fill in) dependents: (fill in); months on board: (fill in);
total service: active-(fill in number of years and months), inactive-(fill in number
of years; and months and when commenced).

c. Involvement with civil authorities: [If none, so state. Advise if member has
appealed or intends to appeal any civil convictions, and time limit within which
member must file appeal. See encl (4) paragraph 1c, of NMPCINST 1910.1D.]

d. Summary of military offense(s): [If none, so state. Otherwise, in subparagraph form give complete, detailed summary of UCMJ violations, i.e., judicial action, charges and specifications, date and/or period of offenses, and punishment awarded. Must include the convening authority's final action on all courts-martial.]

e. Findings of Administrative Board [If no board, so state]

f. Recommendation of Administrative Board [If no board, so state. If fleet reserve eligible, Board must make recommendation regarding reduction in pay grade prior to transfer if member processed for misconduct, homosexuality or security and member elected right to transfer to the fleet reserve.]

g. Type of discharge recommended by Administrative Board: [If no board, so state.]

h. Comments and recommendations of commanding officer (or acting commanding officer).

i. Date and characterization of discharge if commanding officer separates under reference (a).

j. POC for discussion of this case is [Name, Rank, Billet, AUTOVON phone number. State location of member if transferred TAD subsequent to completion of case processing.]

(Signature of Commanding Officer
or acting Commanding Officer)

Copy to:
(appropriate PERSUPPACT/
PERSUPPDET where applicable)
(TAD Command where applicable)

SUBMISSION OF ADMINISTRATIVE BOARD PROCEDURE PROPOSED ACTION
NO ADMINISTRATIVE BOARD CONVENED
MESSAGE FORMAT

FROM:

TO: COMNAVMILPERSCOM WASHINGTON DC

INFO: (ISIC, AS DESIRED AND PERSUPPACT/PERSUPPDET WHERE
APPLICABLE)

UNCLAS //N019100//

SUBJ: [RATE, NAME OF MEMBER, COMPONENT, SSN]; RECOMMENDATION
FOR ADMIN SEPARATION BY REASON OF [STATE REASONS] (N8322)

A. MILPERSMAN _____ (ARTICLE(S) CITING REASON(S) B.
NAVMILPERSCOMINST 1910.1D

1. LAW REFS A AND B FOLLOWING REQUEST FOR ADMIN DISCH SUBMITTED
ICO SNM. CO HAS REVIEWED REFS A AND B AND CERTIFIES THAT THIS
MESSAGE SUBMISSION SUPPORTS THE MOST APPLICABLE REASON(S) FOR
PROCESSING, ACCURATELY REFLECTS THE COMPLETE RECORD IN THIS
CASE AND MEETS MINIMAL REQUIREMENTS FOR PROCESSING. IF DRUG
OR ALCOHOL ABUSE IS INVOLVED, INFO FM MOST RECENT DRUG OR
ALCOHOL SUBSTANCE ABUSE REPORT IS CONTAINED IN PARA 13. AN
ADMINISTRATIVE BOARD HAS NOT BEEN CONVENED IN THIS CASE.
INFORMATION PARAGRAPHS AS OUTLINED IN ENCL 9 TO REF B ARE
LISTED IN TOTAL WITH APPLICABLE INFORMATION NOTED. IF PARA DOES
NOT APPLY, "NA" HAS BEEN INDICATED.

2. REASON FOR SEPARATION PROCESSING: [ONE OR MORE SPECIFIC
REASON(S) VERBATIM AS SPECIFIED IN MILPERSMAN 3630100, 3630400,
3630600 OR 3630620 AS APPROPRIATE. BRIEFLY SUMMARIZE HOW CASE
FOR SEPARATION WAS DEVELOPED, SPECIFICALLY, THE BASIS FOR
PROCESSING (E.G., PROBABLE CAUSE URINALYSIS, STATEMENT,
PUNISHMENT UNDER THE UCMJ AND OTHER SUPPORTING FACTS.)

3. BASIC RECORD DATA: DATE OF CURRENT ENLISTMENT: (DATE) FOR
(FILL IN) YEARS; EAOS: (FILL IN); MARITAL STATUS: (FILL IN); DEPENDENTS:
(FILL IN); MONTHS ON BOARD: (FILL IN); TOTAL SERVICE ACTIVE: (FILL IN
NUMBER OF YEARS AND MONTHS); INACTIVE

(FILL IN NUMBER OF YEARS AND MONTHS AND WHEN COMMENCED);
REENLISTMENT STATUS: (FILL IN "RECOMMENDED"/"NOT RECOMMENDED")

4. INVOLVEMENT WITH CIVILIAN AUTHORITIES: [FILL IN AS APPROPRIATE. IF CIVILIAN CONVICTION INCLUDE INFO PARAS A AND B BELOW.]

A. CIRCUMSTANCES OF OFFENSE(S): [INCLUDE ALL FACTS AND CIRCUMSTANCES SURROUNDING OFFENSE(S) IN SUFFICIENT DETAIL TO INDICATE NATURE AND SERIOUSNESS.]

B. ACTION BY CIVILIAN AUTHORITIES: [INCLUDE CITATION OF CIVIL STATUTE(S) VIOLATED, CHARGE(S) ON WHICH TRIED AND CONVICTED, COURT IN WHICH CONVICTED, SENTENCE OF COURT, MAXIMUM PUNISHMENT WHICH COULD HAVE BEEN IMPOSED FOR SUCH A CONVICTION UNDER UCMJ, AND STATUS OF ANY APPEAL. ADVISE IF MEMBER HAS FILED OR INTENDS TO FILE AN APPEAL AND TIME LIMIT WITHIN WHICH MEMBER MUST FILE APPEAL.]

5. SUMMARY OF MILITARY OFFENSE(S): [LIST IN CHRONOLOGICAL ORDER BY SUBPARAGRAPH: DATE OF NJP/CM; TYPE: NJP/CM; OFFENSE(S); DATE OF OFFENSE(S); NOTE: IDENTIFY OFFENSE(S) TO INCLUDE ALL SPECIFICATIONS, E.G., LENGTH OF UA OFFENSE(S), ETC. ICO COURTS-MARTIAL INDICATE DATE OF COMMAND AUTHORITY FINAL ACTION AND APPROVED FINDINGS AND SENTENCE. GIVE DATE OF PG 13 LTR OF COUNSELING/WARNING HERE AS WELL AS IN PARAGRAPH 13.]

6. SNM'S PAGE 9 IS PROVIDED IN TOTAL AS FOLLOWS: [REFLECT ALL PERFORMANCE MARKS, UCMJ PUNISHMENT(S) AND FINAL TRAIT AVERAGES.]

7. NOTICE OF AN ADMINISTRATIVE BOARD PROCEDURE PROPOSED ACTION

DTD (FILL IN), PROVIDED LAW MILPERSMAN 3640300.2 AND ENCL 6 OF REF B, LISTS THE FOLLOWING SPECIFIC VERBATIM REASON(S) AS STATED IN MILPERSMAN PROCESSING: [FILL IN -- SEE ENCL (15) OF NMPCINST 1910.1D) NO ABBREVIATIONS.] SNM WAS AFFORDED ALL RIGHTS LAW PARA 4 OF ENCL 6 TO REF B. [THIS PARAGRAPH SHOULD MIRROR EXACTLY THE LETTER OF NOTIFICATION.]

8. SNM WAS ADVISED OF RIGHT TO CONSULT WITH COUNSEL BEFORE MAKING A DECISION TO REQUEST OR WAIVE RIGHTS. SNM (DID/DID NOT) CONSULT WITH COUNSEL. [PROVISIONS OF MILPERSMAN 3640300 PERTAIN.]

9. STATEMENT OF AWARENESS DTD (FILL IN), EXECUTED IAW MILPERSMAN 3640300.7 AND ENCL 7 OF REF B INCLUDES VERBATIM REASON(S) FOR PROCESSING AS LISTED IN PARA 7, ABOVE. SNM ACKNOWLEDGED THAT IF SEPARATION IS APPROVED, CHARACTERIZATION OF SERVICE MAY BE UNDER OTHER THAN HONORABLE CONDITIONS. SNM REQUESTED FOLLOWING RIGHTS: [LIST ALL RIGHTS ELECTED]. SNM WAIVED ALL OTHER RIGHTS.

10. SNM (DID/DID NOT) ELECT TO MAKE A WRITTEN STATEMENT. SNM'S STATEMENT [IF ELECTED] IS QUOTED VERBATIM AS FOLLOWS:

11. [IF APPLICABLE] PSYCHIATRIC OR MEDICAL EVALUATION AS FOLLOWS: [BRIEFLY LIST PERTINENT FINDINGS, DIAGNOSIS, RECOMMENDATION(S), AND, IF ALCOHOL/DRUG INVOLVEMENT INDICATED, ADVISE IF MEMBER ALCOHOL/DRUG DEPENDENT.] MEDICAL OFFICER SIGNED EVALUATION ON (DATE). EVALUATION INDICATES SNM (IS/IS NOT) DRUG/ALCOHOL DEPENDENT. SNM (IS/IS NOT) RECOMMENDED FOR FURTHER SERVICE BY MEDICAL OFFICER.

12. IF MBR IS BEING DUAL-PROCESSED FOR CONVENIENCE OF THE GOVERNMENT DUE TO PERSONALITY DISORDER, PROVIDE PSYCHIATRIC EVALUATION HERE. SPECIFICALLY STATE WHETHER MEMBER DIAGNOSED AS A DANGER TO SELF OR OTHERS.

13. MOST RECENT PG 13 ISSUED BY PARENT PROCESSING COMMAND [PROVIDE REGARDLESS OF REASON FOR PROCESSING. A PG 13 IS ONLY REQUIRED FOR PROCESSING FOR MISCONDUCT DUE TO A PATTERN OF MISCONDUCT OR DUE TO MINOR DISCIPLINARY INFRACTIONS, CONVENIENCE OF THE GOVERNMENT DUE TO PERSONALITY DISORDER, ENTRY LEVEL PERFORMANCE AND CONDUCT, OR UNSATISFACTORY PERFORMANCE. DO NOT INTERPRET THIS PARAGRAPH TO MEAN THE COMMAND MUST HAVE COUNSELED MEMBER BEFORE PROCESSING FOR ANY OTHER REASON (S), NOR TO MEAN MEMBER MUST NOW BE GIVEN PG 13. IF NONE SO STATE.]

14. COMMENTS AND RECOMMENDATION OF CO: [IF MEMBER PROCESSED FOR MINOR DISCIPLINARY INFRACTIONS, OR PATTERN OF MISCONDUCT, CONFIRM COUNSELING REQUIREMENT MET IAW MILPERSMAN 3630600 AND INDICATE DATE PAGE 13 ENTRY SIGNED BY MEMBER (SHOULD BE SAME AS PARA 13). CO IS TO STATE HOW THE HOW THE COUNSELING WARNING ENTRY WAS VIOLATED. ICO AN ESTABLISHED PATTERN OF FAILURE TO PAY JUST DEBTS, INCLUDE SUMMARY OF MEMBER'S FINANCIAL STATEMENT IAW MILPERSMAN 6210140.14. ICO HOMOSEXUALITY, COMMENT SHOULD INCLUDE INFORMATION WITH REGARD TO THE REASON(S) FOR THE PROCESSING AND WHETHER THE MEMBER HAS ADMITTED OR DENIED THE HOMOSEXUAL INVOLVEMENT AS DESCRIBED. IF SEPARATION IS RECOMMENDED, CO SHALL MAKE SPECIFIC RECOMMENDATION AS TO CHARACTERIZATION OF DISCHARGE.]

15. COPIES OF NOTICE OF AN ADMINISTRATIVE BOARD PROCEDURE PROPOSED ACTION, STMT OF AWARENESS AND ALL SUPPORTING DOCUMENTATION WILL BE FORWARDED IN 15 WORKING DAYS TO NMPC 8322 IAW PARA 17C OF ENCL 1 TO REF B.

16. POC FOR DISCUSSION OF THIS CASE IS [FILL IN NAME, RANK, BILLET, AUTOVON NUMBER. STATE LOCATION OF SNM IF TRANSFERRED TAD AFTER COMPLETION OF CASE PROCESSING.]

17. UIC _____ (LOCATION OF SNM).

18. CO SENDS. [COMMANDING OFFICER SHOULD ENSURE COMPLETENESS OF SUBMISSIONS. OMISSIONS WILL RESUME IN UNNECESSARY DELAYS OR REPROCESSING.]

CHAPTER 82

ADMINISTRATIVE SEPARATION OF OFFICERS

8201 REFERENCES

- A. SECNAVINST 1920.6 series
- B. MILPERSMAN 3830160
- C. MARCORSEPMAN, Chapter 4

8202 **INTRODUCTION.** Officers may be administratively separated for a wide variety of reasons, involving performance or conduct identified not more than 5 years prior to the initiation of processing. This chapter discusses separation bases, notification and administrative board procedures, and appropriate characterizations of service. Administrative separations in lieu of trial by court-martial are discussed in under military justice in this Deskbook.

8203 **BASES FOR SEPARATION.** This section lists the bases or specific reasons for involuntary separation of officers for cause as discussed in enclosure (3) of SECNAVINST 1920.6 series. An officer may be processed for separation for any reason or combination of the reasons specified below.

A. Substandard Performance of Duty. This ground for separation refers to an officer's inability to maintain adequate levels of performance or conduct. The characterization will be honorable when this is the sole basis. Substandard performance is indicated any of the following:

1. Failure to demonstrate acceptable qualities of leadership required of an officer in the member's grade;
2. failure to achieve or maintain acceptable standards of proficiency required of an officer in the member's grade;
3. failure to properly discharge duties expected of officers of the member's grade and experience;

4. failure to satisfactorily complete any course of training, instruction, or indoctrination which the officer has been ordered to undergo;

5. a record of marginal service over an extended time as reflected in fitness reports covering two or more positions and signed by at least two reporting seniors;

6. personality disorders, when such disorders interfere with the officer's performance of duty and have been duly diagnosed by a physician or clinical psychologist;

7. failure, through inability or refusal, to participate in, or successfully complete, a program of rehabilitation for personal abuse of drugs or alcohol to which the officer was formally referred (nothing in this provision precludes separation of an officer, who has been referred to such a program, under any other provision of this instruction in appropriate cases);

8. failure to conform to prescribed standards of dress, weight, personal appearance, or military deportment; or

9. unsatisfactory performance of a warrant officer, not amounting to misconduct, or moral or professional dereliction.

B. Misconduct, or Moral or Professional Dereliction. Performance or personal or professional conduct (including unfitness on the part of a warrant officer) which is unbecoming of an officer as evidenced by one or more of the following reasons:

1. Commission of a Serious Offense. Processing may be undertaken for commission of a military or civilian offense which, if prosecuted under the UCMJ, could be punished by confinement of six months or more, and any other misconduct which, if prosecuted under the UCMJ, would require specific intent for conviction.

2. Unlawful Drug Involvement. Processing for separation is mandatory. An officer shall be separated if an approved finding of unlawful drug involvement is made. Exception to mandatory processing or separation may be made on a case-by-case basis by the Secretary when the officer's involvement is limited to personal use of drugs and the officer is judged to have potential for future useful service as an officer and is entered into a formal program of drug rehabilitation. The characterization must be honorable in legitimate self-referral cases.

3. **Homosexuality.** The basis for separation may include preservice, prior service, or current service conduct or statements. Processing for separation is mandatory. No officer shall be retained without the approval of the Secretary of the Navy when an approved finding of homosexuality is made. The criteria for retention and characterization are the same as for enlisted members.

4. Sexual perversion

5. Intentional misrepresentation or omission of material fact in obtaining appointment.

6. Fraudulent entry into an armed force or the fraudulent procurement of commission or warrant as an officer in an armed force.

7. Intentional misrepresentation or omission of material fact in official written documents or official oral statements.

8. Failure to satisfactorily complete any course of training, instruction, or indoctrination which the officer has been ordered to undergo when such failure is willful or the result of gross indifference.

9. Marginal or unsatisfactory performance of duty over an extended period, as reflected in successive periodic or special fitness reports, when such performance is willful or the result of gross indifference.

10. Intentional mismanagement or discreditable management of personal affairs, including financial affairs.

11. Misconduct or dereliction resulting in loss of professional status, including withdrawal, suspension, or abandonment of license, endorsement, certification, or clinical medical privileges necessary to perform military duties in the officer's competitive category or Marine Corps occupational field.

12. A pattern of discreditable involvement with military or civilian authorities, notwithstanding the fact that such misconduct has not resulted in judicial or nonjudicial punishment under the UCMJ.

13. Conviction by civilian authorities (foreign or domestic) or action taken which is tantamount to a finding of guilty, for an incident which would amount to an offense under the UCMJ.

C. National Security. An officer (except a retired officer) may be separated from the naval service when it is determined that the officer's retention is clearly inconsistent with the interests of national security. SECNAVINST 5510.30 series, Subj: DEPARTMENT OF THE NAVY PERSONNEL SECURITY PROGRAM. An officer considered for separation under the provisions of SECNAVINST 5510.30 series will be afforded all the rights provided in this chapter.

D. Removal of Ecclesiastical Endorsement. Officers on the active-duty list in the Chaplain Corps, who can no longer continue professional service as a chaplain because an ecclesiastical endorsing agency has withdrawn its endorsement of the officer's continuation on active duty as a chaplain, shall be processed for separation with an honorable discharge.

E. Parenthood. An officer may be separated by reason of parenthood if it is determined that the officer is unable to perform his duties satisfactorily or is unavailable for worldwide assignment or deployment.

F. Dropping from the Rolls. A Regular or Reserve officer may be summarily dropped from the rolls of an armed force without a hearing or a board, if the officer:

1. Has been absent without authority for at least three months; or
2. has been sentenced to confinement in a Federal or state penitentiary after having been found guilty by a civilian court and whose sentence has become final. SECNAVINST 1920.6 series, encl. (4), para. 8.

8204 **LIMITATIONS ON MULTIPLE PROCESSING.** Officers who are processed for separation because of substandard performance of duty or parenthood but are retained, may not again be processed for separation for the same reasons within the one-year period beginning on the date of that determination. By contrast, officers who are processed for separation for misconduct, moral or professional dereliction, or in the interest of national security, but are retained, may again be required to show cause for retention at any time. No officer, however, may again be processed for separation solely because of performance or conduct which was the subject of previous proceedings, unless the findings and recommendations of the board that considered the case are determined to have been obtained by fraud or collusion.

8205 **CHARACTERIZATION OF SERVICE.** Separations are characterized as either honorable, general (under honorable conditions), or under other than honorable conditions.

A. Honorable. An officer whose quality of service has generally met the standards of acceptable conduct and performance of duty for officers of the naval service, or is otherwise so meritorious that any other characterization would be clearly inappropriate, shall have his or her service characterized as honorable.

B. General (under honorable conditions). Characterization of service as general (under honorable conditions) is warranted when significant negative aspects of the officer's conduct or performance of duty outweigh positive aspects of the officer's military record.

C. Other Than Honorable. This characterization is appropriate when the officer's conduct or performance of duty, particularly the acts or omissions that give rise to reasons for separation, constitute a significant departure from that required of an officer of the naval service. Examples include: commission of a serious offense; abuse of a special position of trust; an act or acts which bring discredit upon the armed services; disregard by a superior of customary superior-subordinate relationships; acts or omissions that adversely affect the ability of the military unit or the organization to maintain discipline, good order, and morale or endanger national security.

D. **Limitations**

1. Reserve Officers. Conduct in the civilian community by a Reserve member who is not on active duty or on active duty for training and was not wearing the military uniform at the time of such conduct giving rise to separation, may form the basis for an OTH ONLY if the conduct directly affects the performance of military duties and the conduct has an adverse impact on the overall effectiveness of the service (including military morale and efficiency).

2. Preservice Misconduct. Whenever evidence of preservice misconduct is presented to a board, the board may consider it ONLY for the purpose of deciding whether to recommend separation or retention of the respondent. Such evidence shall not be considered in recommending the characterization of service. The board shall affirmatively state in its report that such evidence was considered only for purposes of determining whether it should recommend retention or

separation. Service must be characterized as honorable when the grounds for separation are based SOLELY on preservice activities.

8206 NOTIFICATION PROCEDURES

A. Applicability. The notification procedure shall be used when:

1. A probationary Regular officer or a Reserve officer above CWO-4 with less than three years of commissioned service, or a permanent Regular or Reserve warrant officer with less than three years of service as a warrant officer, is processed for separation for substandard performance of duty or for parenthood;
2. a temporary LDO or temporary warrant officer is processed for termination of his temporary appointment for substandard performance of duty, misconduct or moral or professional dereliction, retention not consistent with national security, or parenthood (an officer whose temporary appointment is terminated reverts to his permanent status as a warrant officer or enlisted member);
3. a probationary officer is processed for separation for misconduct, or moral or professional dereliction, retention not consistent with national security, or parenthood and a separation with an honorable or general characterization of service is recommended by a board of officers to the Secretary of the Navy;
4. a Reserve officer is processed for removal from an active status due to age or lack of mobilization potential; or
5. a Regular or Reserve officer is processed for separation for failure to accept appointment to O-2.

B. Letter of Notification. The commanding officer shall notify the officer concerned in writing of the following:

1. The reasons for which the action was initiated (including the specific factual basis supporting the reason);
2. the recommended characterization of service is honorable (or general, if such a recommendation originated with a board of officers);
3. that the officer may submit a rebuttal or decline to make a statement;

4. that the officer may tender a resignation in lieu of separation processing;
5. that the officer has the right to confer with appointed counsel;
6. that the officer, upon request, will be provided copies of the papers to be forwarded to SECNAV to support the proposed separation (Classified documents may be summarized);
7. that the officer has the right to waive the rights enumerated in paragraphs 3, 4, 5, and 6 above, and that failure to respond shall constitute waiver of these rights; and
8. that the officer has a specified period of time (normally five working days) to respond to the notification.

C. Right to Counsel. A respondent has the right to consult with qualified counsel except when the commander determines that the needs of the service require expeditious processing and access to qualified counsel is not anticipated for at least the next five days because the command is overseas or distant from judge advocate resources. Nonlawyer counsel shall be appointed whenever qualified counsel is not available. The respondent may also consult with a civilian counsel at no expense to the government.

D. Response. The respondent shall be provided a reasonable period of time -- normally five working days, but more if in the judgment of the commanding officer additional time is necessary -- to act on the notice. An extension may be granted by the commanding officer upon a timely showing of good cause by the officer. Failure to elect desired rights, even if notice is provided by mail as authorized for the Reserves, constitutes a waiver of rights and an appropriate notation will be made in the case file. If the respondent elects one or more rights but declines to sign the appropriate notification statement, note the rights elected and the refusal to sign.

E. Submission to SECNAV. The commander forwards the case file with the letter of notification and response, supporting documentation, and any tendered resignation to SECNAV via CNP or CMC, as appropriate. SECNAV determines whether sufficient evidence exists to support the allegations set forth in the notification for each of the reasons for separation. The Secretary may then:

1. Retain the officer;

2. order the officer separated or retired, if eligible (if there is sufficient factual basis for separation);

3. accept or reject a tendered resignation; or

4. direct, if the Secretary determines that an honorable characterization is not appropriate, that the case of a Regular O-1 or above be reviewed by a board of officers or that the case of any other officer be reviewed by a board of inquiry. If the case was initiated by a board of officers and SECNAV determines that the recommended honorable or general characterization of service is inappropriate, the case may then be referred directly to a board of inquiry.

8207 ADMINISTRATIVE BOARD PROCEDURES

A. Three-tiered board system. The administrative board procedure refers to a three-tiered board system consisting of a board of officers, board of inquiry, and board of review, which must be used to remove certain Regular commissioned officers (not retired or commissioned warrant officers) from active duty for cause. Officers may be entitled to the three-tiered board because of the adverse characterization of their separation or their years of commissioned service. The following officers are so entitled:

1. Any Regular officer being processed for misconduct, or moral or professional dereliction, national security or any other basis which might result in an OTH; and

2. a nonprobationary officer, i.e., generally, a Regular officer have at least five years commissioned service, being processed for substandard performance of duty or parenthood.

B. Board of Inquiry Only. Other officers who are entitled to a hearing before an administrative board before separation for cause are referred to a board of inquiry only. If proceedings by a board of inquiry are mandatory to discharge or release an officer from active duty, such action will not be taken except upon the approved recommendation of such a board. The following officers are processed for separation by referral of their cases ONLY to a board of inquiry:

1. Reserve officers (including Reserve warrant officers) and permanent Regular warrant officers being processed for termination of appointment

or separation because of misconduct, moral or professional dereliction, or retention inconsistent with the interests of national security; and

2. Reserve officers with more than three years of commissioned service, Reserve warrant officers with more than three years of service as a warrant officer, and permanent Regular warrant officers with three or more years of continuous active service from the date they accepted their original appointment as warrant officers, being processed for separation or termination of his appointment for substandard performance of duty or parenthood (as defined in section 0813A, G above);

3. any case not specifically provided for involving discharge under other than honorable conditions; and

4. any other cases the Secretary considers appropriate, e.g., retired-grade determinations in certain voluntary retirement cases.

C. Board Membership. Boards of officers, boards of inquiry, and boards of review shall consist of not less than three officers in the same armed force as the respondent.

1. In the case of Regular commissioned officers (other than temporary LDOs and WOs), members of the board shall be highly qualified and experienced officers on the active-duty list in grade O-6 or above and senior in grade to the respondent.

2. In the case of Reserve, temporary LDOs, and WOs, the members shall be senior to the respondent; if the respondent is a reservist, at least one member of the board shall be a Reserve officer, unless SECNAV otherwise directs.

3. At least one member shall be an unrestricted line officer. This officer will have command experience whenever possible. One member shall be in the respondent's competitive category. However, if the respondent's competitive category does not include O-6s or above, an O-6 from a closely related designator shall be used to satisfy this requirement. If that is not possible, an unrestricted line officer shall be used. CNP or CMC may waive each of these requirements on a case-by-case basis when compliance would result in undue delay.

4. When sufficient highly qualified and experienced officers on the active-duty list are not available, the convening authority shall complete board membership with available officers who have been retired for less than 2 years and

otherwise meet the criteria set forth above. For boards of inquiry, the convening authority may select qualified board members from outside the command.

5. Officers with personal knowledge pertaining to the particular case shall not be appointed to the board considering the case. No officer may be a member of more than one board convened under this instruction to consider the same officer.

6. The senior member of a board of officers or board of inquiry shall be the presiding officer and rule on all matters of procedure and evidence, but may be overruled by a majority of the board. If appointed, the legal advisor shall rule finally on all matters of procedure and evidence.

D. Other Participants. The convening authority SHALL appoint a nonvoting recorder to perform such duties as appropriate. The convening authority MAY appoint a nonvoting legal advisor to perform such duties as the board desires. Neither the recorder nor the legal advisor shall not participate in closed sessions of any board. The convening authority shall rule finally on all challenges for cause against the legal advisor.

E. Board of Officers

1. Convening. CNP or CMC shall convene boards of officers for Regular officers when referred by the Secretary, or when they receive information of incidents involving officers whose performance or conduct is such that processing for separation by board procedures is appropriate or required. The board reviews the officer's record to determine whether the officer should be required, because of substandard performance of duty, misconduct, moral or professional dereliction, or national security interests, to show cause for retention on active duty.

2. Notification and board review. An officer shall be advised of impending proceedings by a board of officers which considers all record information available prior to making its determination. The board has no independent investigative function and may not hear testimony or depositions from witnesses or the respondent.

3. Board Decisions. The board of officers, after deliberations, shall determine by majority vote one of the following:

a. That none of the reasons are supported by sufficient evidence of record to warrant referral to a board of inquiry and that the case is, therefore, closed; or

b. that there is sufficient evidence that the respondent should be required to show cause for retention for one or more of the reasons specified. [This determination is mandatory when a preponderance of the evidence supports a finding of homosexual conduct or unlawful drug involvement.]

4. Board Report. The report of the board, signed by all members, shall state that its findings were by majority vote and include:

a. A finding on each of the reasons for separation specified, together with a summary of the facts;

b. a conclusion that the case should be closed or the respondent required to show cause for retention for reasons specified; and

c. a recommendation, in the case of a probationary officer, if the circumstances warrant, that the officer be separated with an honorable or general characterization of service and the facts supporting that recommendation. [This recommendation is not binding.]

5. Action on the Board Report. The board report shall be reviewed by the CNP or CMC. Generally, reports shall not be returned to the board for reconsideration of findings, opinions, or recommendations going to the substantial merits of the case. If the board of officers closes the case, no further proceedings are conducted. If the board finds sufficient evidence to require the respondent to show cause for retention, the CNP or CMC shall, upon approval of the findings of the board of officers, convene a board of inquiry. If the board recommends direct separation of a probationary officer with an honorable or general characterization of service, the case shall be processed under notification procedures.

F. Board of Inquiry

1. Convening. CNP or CMC, or an officer exercising general court-martial jurisdiction when so directed, shall convene a board of inquiry to give the officer a full and impartial hearing at which he may respond to, and rebut, the allegations which form the basis for separation for cause and/or retirement in an inferior pay grade, and present matters favorable to his case on the issues of separation and/or characterization of service.

2. Notification and Respondent Rights. At least 30 days before the board of inquiry hearing, the respondent shall be notified in writing of the reasons why the respondent is being required to show cause for retention in the naval service

or retirement in the grade next inferior to that currently held; and the least favorable characterization of service authorized. The respondent must also be notified of their rights at the board of inquiry, which are akin to those held by enlisted members before an administrative discharge board. Failure to respond after being afforded a reasonable opportunity to consult with counsel constitutes a waiver of those rights.

3. Board Decisions. The board shall make the following determinations, by majority vote, based on the evidence presented at the hearing:

a. A finding on each of the reasons for separation specified, based on the preponderance of evidence;

b. a recommendation for separation of the respondent from the naval service for specified reasons with a characterization of service and for referral of the case to the board of review, when required [a recommendation for separation is mandatory when a preponderance of the evidence supports a finding of homosexual conduct or unlawful drug involvement];

c. a finding that none of the reasons specified are supported by sufficient evidence prescribed to warrant separation for cause and the case is, therefore, closed; or

d. a recommendation, in the case of a retirement-eligible officer, for retirement in the current grade or, if the officer has not satisfactorily served in that grade, the next inferior grade.

7. Board Report. The board report, signed by all members (including any separate, minority reports), shall include a verbatim transcript of the board's proceedings for Regular commissioned officers when directed by the convening authority; a summarized transcript can be prepared all other cases. The transcript shall be provided to the respondent for examination prior to signature by the board members. The transcript will note that that opportunity was afforded; any deficiencies identified by the respondent shall be attached to the report. The report shall also include:

a. The individual officer's service and background;

b. each of the specific reasons for which the officer is required to show cause for retention;

c. each of the acts, omissions, or traits alleged and the findings on each of the reasons for separation specified;

d. the position taken by the respondent with respect to the allegations, reports, or other circumstances in question and the acts, omissions, or traits alleged;

e. the recommendations of the board that the respondent be separated and receive a specific characterization of service, or, if retirement eligible, that the officer be retired in the grade currently held or in the next inferior grade; or

f. the finding of the board that separation for cause is not warranted and that the case is closed; and

g. a copy of all documents and correspondence relating to the convening of the board (e.g., witness request).

[The respondent shall be given a copy of the report of proceedings and the findings and recommendations of the board and given an opportunity to submit written comments for consideration by the board of review.]

8. Action on the report. The report of the board shall be submitted via the convening authority to CNP or CMC for termination of proceedings or further action, as appropriate. Further action may include:

a. In the case of Reserve officers, LDOs, and WOs recommended for separation, review and endorsement of the case to SECNAV for final determination;

b. in the case of Regular O-1's or above recommended for removal from active duty, delivery of the case to the board of review; and

c. in the case of a retirement-eligible officer whose case was referred to the board solely to determine the appropriate retired grade, review and endorsement of the case to SECNAV.

G. Board of Review

1. Convening. Boards of review are convened by CNP or CMC to review the reports of boards of inquiry which recommend separation for cause of permanent Regular O-1's and above and make recommendations to the Secretary.

2. Respondent's Rights. The respondent does not have the right to appear before a board of review or to present any statement to the board, except the statement of rebuttal to the findings and recommendations of the board of inquiry.

3. Board's Review and Report. The board report shall be signed by all members including any separate, minority reports. The board shall make the following determinations by majority vote, based on a review of the report of the board of inquiry:

a. A finding that the respondent should be retained on active duty and the case is, therefore, closed; or

b. a finding that the respondent has failed to show cause for retention on active duty, together with a recommendation as to characterization of service not less favorable than that recommended by the board of inquiry. [A recommendation for separation is mandatory when a preponderance of the evidence supports a finding of homosexual conduct or unlawful drug involvement.]

4. Action on the Board's Report. The board of review's report which recommends separation shall be delivered with any desired recommendations by the CNP or CMC to SECNAV who may direct:

a. Retention; or

b. discharge with a characterization of service not less favorable than that recommended by the board of inquiry.

H. Retirement and Resignation. An officer who is being considered for removal from active duty who is eligible for voluntary retirement may, upon approval by the Secretary, be retired in the highest grade in which he served satisfactorily as determined by the Secretary under the guidelines of 10 U.S.C. § 1370.

1. Enclosure (6) to SECNAVINST 1920.6 series, allows the Secretary to reduce an officer only one grade for not serving "satisfactorily," even if he meets the time-in-grade requirements. 10 U.S.C. § 1370 authorizes more than a one-grade reduction, but the Secretary is restricted to a one-grade reduction.

2. An officer who is not eligible for retirement may submit an unqualified resignation (honorable discharge), qualified resignation (general or honorable discharge acceptable), or resignation for the good of the service (any characterization of service acceptable) to the Secretary.

OFFICER SEPARATION FLOW CHART**I. PROBATIONARY OFFICER (Less than 5 years commissioned service)**

Substandard Performance ----- Notification
 Parenthood

Misconduct ----- CNP ----- Rec ----- Notification
 National Security Hon/Gen (SECNAV approval)

II. NONPROBATIONARY OFFICER (5 or more years commissioned service) & PROBATIONARY OFFICERS WHO MAY RECEIVE AN OTH.**Three-tier Board Procedures**

Any Basis-----	B/O-----	Show-----	B/I-----	Sep-----	B/R-----	Sep-----	SECNAV-----	Sep
For Sep		Cause						
CNP/CMC		LOCAL		CNP/CMC				
(Record)		(Hearing)		(Review)				
Close Case		Close Case		Close Case		Close Case		

III. RESERVE OFFICER

R.A.D.-----No Board-----No Notification

Less Than-----Substandard-----No Board----- Notification
 3 years Performance/Parenthood

IV. PERMANENT REGULAR WARRANT OFFICER

Less Than-----Substandard Performance----- Notification
 3 years Parenthood

Other Basis-----B/I-----CNP/CMC-----Sep/Retain

V. TEMPORARY LIMITED DUTY OFFICER/WARRANT OFFICER

Any Basis-----Notification
For Separation

OTHER OFFICER PERSONNEL MATTERS

8208 **INTRODUCTION.** The Constitution provides that the President shall "Commission all the Officers of the United States." U.S. Const. art. II, § 3. The appointment and commissioning of officers in the armed forces is prescribed by Title 10, which includes the Defense Officer Personnel Management Act (DOPMA). The transition provisions of DOPMA can be found in small print immediately following 10 U.S.C. § 611.

8209 **APPOINTMENTS**

A. **Entry-Grade Credit.** Many officers, particularly those in the staff corps, receive credit upon appointment in the Navy or Marine Corps for prior commissioned service or advanced education and training completed while not in a commissioned status. The Secretarial regulations on initial appointment in the various staff corps or as judge advocates include the following:

1. Chaplain Corps - SECNAVINST 1120.4 series;
2. Civil Engineer Corps - SECNAVINST 1120.7 series;
3. Judge Advocate General's Corps (JAGC) - SECNAVINST 1120.5 series (direct commissions and JAGC student program - prior commissioned service credit plus law school time while not in a commissioned status) and SECNAVINST 1120.7 series (Law Education Program - prior commissioned service credit only);
4. Marine judge advocates - SECNAVINST 1120.9 series (credit for prior commissioned service, plus constructive service credit for time in law school while not in a commissioned status);
5. Medical and Dental Corps - SECNAVINST 1421.5 series;
6. Nurse Corps - SECNAVINST 1120.6 series; and
7. Medical Service Corps - SECNAVINST 1120.8 series.

B. **Placement on the Active-Duty List.** The active-duty list is used for determining eligibility for consideration for promotion by an active-duty promotion board and for determining precedence. Rules for position on the list are set forth in SECNAVINST 1427.2

series. While position is generally fixed by grade and date of rank, a Reserve officer recalled to active duty after a break in active service of more than six months may have the date of rank in grade adjusted to a later date of rank (more junior) to give them more time to compensate for their break in active service before consideration by an active-duty promotion board.

8210 **PROMOTIONS.** Each year the Secretary of the Navy approves a master promotion plan, with specific selection opportunities for each competitive category and grade, based upon projected vacancies and requirements in that competitive category and grade. The promotion zones are established with a view toward providing relatively similar opportunities for promotion over the next five years. The basic reference for promotions is SECNAVINST 1420.1 series

A. Communication with Selection Boards. The convening of a promotion selection board is publicized by ALNAV at least 30 days in advance. Each officer eligible for consideration by the board may communicate in writing with the board (including endorsements or enclosures prepared by another). The communication must arrive by the date the board's convenes. SECNAVINST 1420.1, para. 5h.

B. Reserve Officer Deferrals. A Reserve officer recalled to active duty and placed on the active-duty list may request deferral of consideration for promotion by an active-duty promotion board for up to one year from the date the officer enters on active duty and is subject to placement in the active-duty list.

C. Promotion Boards. A precept signed by the SECNAV convenes each selection board and to furnish it with pertinent statutory, regulatory, and policy guidelines and skill-needs information. The membership of selection boards is constituted in accordance with 10 U.S.C. § 612 and paragraph 5e of SECNAVINST 1420.1 series. Each officer selected by a board must be fully qualified and the best qualified for promotion within each competitive category, giving due consideration to the needs of the armed force for officers with particular skills. The report of selection board, including the list of eligible officers and selectees, is forwarded to the SECNAV for approval and subsequent publication of the selectees' names by message. An officer has failed of selection when considered for promotion to grade O-6 or below as an officer in or above the promotion zone and not selected. Counseling of failed-of-select officers is required by paragraph 6 of SECNAVINST 1420.1 series and MILPERSMAN, art. 2220210.

D. Delay of Promotions. The promotion of an officer on the active-duty list may be delayed under 10 U.S.C. § 624(d) and paragraph 7b of SECNAVINST 1420.1 series. The officer must be given notice of the delay and an opportunity to submit a statement. The

time limitations of 10 U.S.C. § 624(d)(4) dictate that such cases be processed expeditiously. In appropriate cases, SECNAV or the President can remove the officer's name from the promotion list for cause. Grounds for delay include:

1. Sworn charges against the officer have been received by the officer's GCM convening authority and the charges have not been disposed of;
2. an investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer;
3. a board of officers has been convened to determine whether the officer should be required to show cause for retention on active duty;
4. a criminal proceeding in a Federal or state court is pending against the officer; or
5. there is cause to believe that the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which selected for promotion.

E. Special Selection Boards. Special promotion-selection boards provide an avenue of relief for officers who through an error or omission were not considered, or not properly considered, by a regularly scheduled active-duty-list selection board. Detailed guidelines concerning these boards are contained in SECNAVINST 1401.1 series. This instruction applies only to errors or omissions which occurred after 15 September 1981. There is no provision in law for special selection boards for Reserve inactive-duty promotions.

1. Grounds. SECNAV MUST convene a special promotion-selection board when an eligible officer who was in, above, or below the promotion zone was not considered, through administrative error, for promotion by a regularly scheduled promotion-selection board for his competitive category and grade. In addition, SECNAV MAY convene a special promotion-selection board when an officer who was an in- or above-zone eligible was considered, but not selected, by a regularly scheduled selection board and:

- a. The action of the board was contrary to law;
- b. the action of the board involved material error of fact or material administrative error; or

- c. the board did not have material information before it for its consideration.

2. Procedure. Special-promotion-selection-board procedures basically involve comparing the record of an officer seeking relief from a selection-board error or omission to a sampling of records of officers who were selected and not selected by the regularly scheduled selection board before whom the error or omission occurred.

F. Reserve Officers Not on the Active-Duty List. Reserve officers not on the active-duty list, serving in a Reserve component in grades O-2 or above, are assigned running mates from the active-duty list in the same competitive category and are placed on a Reserve precedence list comparable to the active-duty list. In addition to those which match the competitive categories for active-duty-list officers, Reserve competitive categories include TAR's and Special Duty Officers (Merchant Marine).

8211 **RESIGNATIONS.** SECNAV may accept an officer's resignation which satisfies the criteria in SECNAVINST 1920.6 series, encl. (2), as well as the amplifying criteria set forth in MILPERSMAN, art. 3830340 or MARCORSEPMAN, paras. 5002-5004, as appropriate. The reasons for voluntary separation include: Expiration of obligated service; change of career intentions; and convenience of the government (dependency or hardship, pregnancy or childbirth, conscientious objector, surviving family member, alien status, and separation to accept public office or to attend college). Requests for resignation may be denied if the officer has not completed all obligated service or has not met established procedures as regards tour lengths, contact relief, timeliness of requests, etc.

8212 **VOLUNTARY RETIREMENTS.** The policy guidelines concerning consideration of voluntary retirement requests are set forth in SECNAVINST 1811.3 series, Subj: Voluntary Retirement of Members of the Navy and Marine Corps Serving on Active Duty; policy governing. See also MILPERSMAN, arts. 3860100, 3860260-3860300; MARCORSEPMAN, paras. 2003-2004.

8213 **INVOLUNTARY RETIREMENT**

A. DOPMA. The DOPMA provisions concerning involuntary retirement or discharge of Regular commissioned O-2's through O-6's (other than LDO's), who are not covered by the savings provisions discussed below, for failures of selection or years of service are as follows:

Grounds for discharge

<u>Grade</u>	<u>or, if eligible, retirement</u>
O-2	2 failures of selection
O-3	2 failures of selection
O-4	2 failures of selection
O-5	28 years of active commissioned service*
O-6	30 years of active commissioned service*

* See DOPMA section 624(a) for special rules regarding computation of active commissioned service for pre-DOPMA officers.

B. General Savings Provision. Section 613(a) of the transition provisions of DOPMA provide that Regular officers serving in grades O-4, O-5, or O-6, or on a promotion list to such grades on 14 September 1981, shall be retired under pre-DOPMA laws. If later selected for promotion to a higher grade or continuation on active duty by a board convened under DOPMA, those officers become subject to the DOPMA involuntary-retirement provisions.

C. Additional Savings Provisions. SECNAVINST 1920.6 series, encl. (3), para. 3., contains savings provisions for women officers in the line, Supply Corps, Civil Engineer Corps, and Chaplain Corps serving in grades O-2 and O-3 and for pre-DOPMA flag and general officers. SECNAVINST 1821.1 series implements DOPMA §§ 613 and 624 to govern the computation of total commissioned service for purposes of involuntary retirement or discharge of certain staff corps officers. Service dates under that instruction are computed by assigning the staff corps officer the same service date as an NRJTC or USNA graduate who is a due-course officer with continuous active service and who is immediately junior to the staff corps officer being matched. The service date is then adjusted to a later date to reflect any constructive service credit received upon appointment.

8214 **CONTINUATION ON ACTIVE DUTY.** An officer subject to discharge as an O-2, O-3, or O-4 for two failures of selection, who is within 2 years of attaining eligibility for voluntary retirement for 20 years of active service, will be retained on active duty until eligible for retirement. Six months' time in grade is generally required for involuntary retirement of a Regular officer in the highest grade in which satisfactorily served. A Regular O-3 or above subject to involuntary retirement or discharge for failure of selection or years of service may, if selected by a continuation board, be continued on active duty. The decision to convene a continuation board for a particular competitive

category and grade is a discretionary management tool SECNAV may use when there is shortfall in manning in a particular competitive category and grade or in a skill area within a competitive category. Pertinent references include:

- A. 10 U.S.C. § 637(d)[SECDEF shall prescribe regulations for continuation on active duty]
- B. 10 U.S.C. § 637(a)(1)(C)[Reserving to SECNAV, whenever the needs of the service require, continuation on active duty of officers otherwise subject to discharge or retirement]
- C. DoD Directive 1320.8 [Mandating the continuation on active duty of all O-4's within six years of qualifying for retirement]
- D. SECNAVINST 1920.7 [Reserving the discretion to convene continuation boards to the Secretary based on the needs of the service, but mandating that an officer selected for continuation on active duty, who is within six years of qualifying for retirement, be continued until eligible for retirement]

8215 **SEPARATION PAY.** Regular and Reserve officers and Reserve enlisted members involuntarily discharged or released from active duty with 5 or more, but less than 20, years of active service are entitled to separation pay, except when discharged or dismissed by sentence of a court-martial, dropped from the rolls, discharged under other than honorable conditions, released from active duty for training, or, upon discharge or release from active duty, are eligible for retainer or retired pay. Eligibility for separation pay and pay computations are governed by SECNAVINST 1900.7 series.

CHAPTER 83

DETACHMENT FOR CAUSE

8301 REFERENCES

- A. MILPERSMAN 3410100.5
- B. NAVMILPERSCOMINST 1611.1 series

8302 **INTRODUCTION.** "Detachment for cause" (DFC) refers the administrative removal of Navy officers from their current assignment by reason of misconduct or unsatisfactory or marginal performance of duty. The DFC is one of the most serious officer administrative measures. Filed in the officer's official record, the DFC has a significant adverse effect on the officer's future naval career, particularly with regard to promotions, duty assignments, selections for schools, and special assignments. The Marine Corps has no counterpart to the DFC, save the passing reference in paragraph 2209 of MCO P1000.6 (ACTSMAN).

8303 **BASIS.** Commanders may request a DFC when an officer displays unsatisfactory or marginal performance over an extended period involving one or more significant events where negligence, incompetence, or disregard is involved. DFC requests may be made after disciplinary action has been taken but the DFC should not be used in lieu of disciplinary action. Similarly, the DFC is inappropriate when the command has reasonable alternatives to resolve the problem, particularly in shore commands. When training, guidance, reassignment within the command or authorized command disciplinary action has occurred, allow a reasonable period for the officer to improve performance before requesting DFC.

8304 **COUNSELING.** Generally, the officer must be counseled by the command. Counseling may be inappropriate in cases involving misconduct or a significant event. If, after a reasonable period of time, the officer has not achieved a satisfactory level of performance, the command should consider issuing the officer a letter of instruction (LOI).

8305 **DOCUMENTATION.** All factual allegations of misconduct or unsatisfactory or marginal performance of duty should be adequately documented e.g., fitness reports, criminal investigations. Fitness reports may comment on LOIs, but not nonpunitive letters of caution.

8306 **CONTENTS OF THE REQUEST.** The request shall contain a reasonably detailed statement of the specific incidents of misconduct or performance; corrective action taken to improve inadequate performance including counseling; and any disciplinary action taken, in progress, or contemplated. Chronologies of events are helpful. Special fitness reports are no longer submitted in conjunction with DFC requests per NAVMILPERSCOMINST 1611.1.

8307 **SUBMISSION OF THE DFC**

A. Requests from Commanders. DFC requests from commanders should make the first via addressee the officer, if on board, or his current commander if temporarily assigned elsewhere, followed by the officer concerned. The officer shall be afforded a reasonable period of time, normally 10 working days, in which to prepare a statement OR signify that the officer read the request, had a chance to respond, and does not desire to make a statement.

B. Routing. After the officer concerned, the next via addressee is the requesting officer, to give the commander an opportunity to comment on any statement by the officer. The commanding officers then forwards the request through the ADMIN COC through the first flag officer who then sends it to CNMPC. Each endorsing command has 5 working days to endorse a DFC request.

C. Flag Officer Requests. DFC requests from flag officers should be made by letter to CNMPC with copies to the administrative chain of command. Send a copy to the operational commander if he is not in the ADMIN COC. Send an advance copy to NMPC-82.

D. Handling. The DFC request is forwarded in double envelopes marked "For Official Use Only." Requests can be submitted by "Personal For" message in exigent circumstances. The message must be confirmed by the standard written report.

8308 **ACTION FOLLOWING THE SUBMISSION:** Following the DFC request, the officer can be assigned TAD to another command. The DFC request cannot be mentioned in fitness reports but the commander can always comment on the underlying performance.

8309 **ENLISTED PERSONNEL.** Per MILPERSMAN 3420260, the DFC can be used for enlisted personnel in pay grades E-7 through E-9, and any member E-6 and below who is the only sailor in the rating specialty on board. The basis for the request is the same as for officers. Similarly, the command must exhaust lesser alternatives. If unsuccessful, send the DFC request to NMPC-831 marked "Enlisted Performance For Official Use Only".

SAMPLE DFC REQUEST

From: Requesting Command
To: Commander, Naval Military Personnel Command (NMPC-82)
Via: (1) [Officer concerned]
(2) [Requesting command, if officer still present]
(3) [Administrative chain of command to first flag officer]

Subj: DETACHMENT FOR CAUSE ICO [Fully identify the officer concerned]

Ref: (a) MILPERSMAN 3410105
(b) [As necessary]

Encl: (1) Fitness reports
(2) Letters of Instruction
(3) Documented counseling and guidance
(4) Supervisor statements
(5) Logs, records, or other relevant documents
(6) NJP reports
(7) Court-martial orders
(8) Records of civil convictions
(9) Officer's acknowledgment form

1. Per reference (a), I request that [officer concerned] be detached for cause from [command] by reason of [(misconduct) (unsatisfactory performance of duty involving a significant event) (unsatisfactory performance of duty over an extended period of time) (my loss of confidence in [officer concerned's] ability to command) (other as warranted)].

2. [Officer concerned] has been assigned to this command since [date] and has been performing duties as [billet to which assigned or duty involved] since [date].

3. [Include the factual support for the reasons specified in paragraph 1 and justification for the request citing appropriate enclosures.]

4. [Use the next paragraphs to discuss any relevant and appropriate matter, e.g., reassignment feasibility, status or results of any disciplinary action, etc.]

5. I have given a copy of this request to [officer concerned] on this date and, by enclosure (9), have informed [(him)(her)] that: the request may be filed in [(his)(her)] official record;

that [(he)(she)] has a right to submit a written statement; and has [(10 days within which)(until [date])] to do so.

CO SIGNATURE

Copy to: [Officer concerned]
[Other as required]

SAMPLE ACKNOWLEDGMENT LETTER

[This letter is required unless the officer is under medical care under circumstances where the physician opines that referral of this matter would have adverse medical consequences or when referral cannot be made without the unauthorized disclosure of classified information]

Date

I have received the letter requesting my detachment for cause and I understand that the request may be filed in my official record.

I am aware of the contents of Article 5020100 of the NAVPERS 15560A, Naval Military Personnel Manual, and I (do)(do not) desire to make a written statement.

I further understand that I have (10 calendar days)(until [date]) to submit my statement if I made that election and that failure to submit a statement in that period of time will be treated as a waiver of that right. I understand that any statement I make must be couched in temperate language; be confined to the pertinent facts; and not impugn the motives of others or make countercharges.

SIGNATURE
TYPED NAME

[If the officer refuses to acknowledge the DFC, explain the DFC process to the officer, i.e., that the DFC may be included in the officer's official record and the officer has a right to submit a written statement concerning it. If the officer refuses to sign, add the following entry.]

[Officer concerned] was advised of the detachment for cause process and refused to acknowledge it.

SIGNATURE
TYPED NAME OF COMMAND REPRESENTATIVE

CHAPTER 84

DISABILITY EVALUATION SYSTEM

8401 **REFERENCES.** The statutory basis for the Disability Evaluation System (DES) is 10 U.S.C. §§ 1201-1221. The implementing instructions are DoD Directive 1332.18, Separation from the Military Service by Reason of Physical Disability and SECNAVINST 1850.4 (series) and its enclosure, the Disability Evaluation Manual. See also MARCORSEPMAN, chapter 8 and MILPERSMAN 3860340-3860400. The Director, Naval Council of Personnel Boards (DIRNCPB) is responsible for the operation of the system. This chapter outlines the process.

8402 **INITIAL EVALUATION.** Servicemembers with conditions which may render them unfit are initially evaluated by a medical board of a naval hospital. The medical board (usually a report by a single medical officer) is a preliminary step and not part of the system. A DES Counselor, usually a senior enlisted member, is appointed to counsel the servicemember concerning the elements of the disability system. If a medical board recommends a disability evaluation, the convening authority forwards the medical board's report to the PEB, after giving the member an opportunity to submit a written rebuttal to the conclusions of the board.

8403 **MENTAL COMPETENCY.** If the member's ability to manage his personal affairs is doubtful, a medical board must be held to determine competency. The board is composed of three physicians, one of whom is a psychiatrist. The three-member medical board is not required if the member is not expected to live more than 96 hours after the preparation of the board. In times of war, if a member is not expected to live, a casualty report may be substituted for a medical board, provided it contains the member's diagnosis, prognosis, and current mental status.

8404 **THE PHYSICAL EVALUATION BOARD (PEB).** Cases of members who may actually be unfit are referred to the PEB. Located in Arlington, Virginia, the PEB is the primary component of the DES. The PEB makes Secretarial determinations of fitness for duty, entitlement to disability benefits, and disposition of members of the naval service. The PEB is composed of the Record Review Panel (RRP) and three Hearing Panels. Panel members are senior officers in the Navy or Marine Corps. One member of each panel must be a Medical Corps Officer.

8405 **DISABILITY EVALUATION.** Disability evaluation requires a determination whether a member is fit or unfit. If the member is unfit, the PEB must determine whether the condition was due to the member's misconduct and the disability must be rated. The referral to the PEB enters the case into the DES. The RRP reviews the findings of the medical board, any line of duty/misconduct determinations and any other available information concerning the case. Command line of duty/misconduct opinions, however, are not binding on the PEB.

8406 **RATING DISABILITIES.** After a Physical Evaluation Board considers a member unfit, it will normally award a servicemember a disability rating. These ratings are based on the Veterans Administration Schedule of Rating Disabilities found in 38 C.F.R. § 4.1 et seq., as modified by DoD Directive 1332.18.

A. Rating Standard. The standard for rating disabilities is the member's civilian employability. The individual ratings can be from 0% to 100% in increments of 10%. In the case of multiple disabilities, the percentages are combined and rounded to the nearest 10% increment. Disabilities which render a member totally unemployable will be rated at 100%.

B. Separation and Retirement. A member who has less than 20 years of creditable service will be separated with severance pay under 10 U.S.C. § 1212 for any disability less than 30%. An unfit member who is otherwise entitled to retire or whose disability is rated at least 30 percent under the Veterans Administration Schedule is retired with retirement pay computed under 10 U.S.C. § 1401. All other servicemembers given a disability award will be placed on either the Temporary Disability Retired List (TDRL) or the permanently retired if his or her disability is not expected to improve or deteriorate. Those servicemembers placed on the TDRL will be given a medical examination at least once every eighteen months for the first five years of retirement until their condition has stabilized. At the end of the five year period, all members still unfit will be permanently retired. Members later found fit for duty may be returned to active duty per 10 U.S.C. § 1211 or separated.

C. Exclusions.

1. Pre-service Conditions. Any member who incurs a disability prior to being entitled to receive basic pay is ineligible for disability compensation. If the disease or injury is aggravated by military service, an offset will be applied to that portion of the disability deemed not service-connected. This rule is waived for

all members awarded a disability rating of 100%. Midshipmen are not considered servicemembers within this disability system.

2. Misconduct and Neglect. Another exclusion applies if the disability was incurred due to the member's intentional misconduct (gross negligence) or willful neglect. Misconduct cases involving intoxication follow the same rules as for line of duty misconduct determinations. The typical case of willful neglect involves the servicemember who refuses to comply with a physicians order to refrain from smoking or to lose weight.

3. Unauthorized Absence. The other major exclusion involves those cases in which the disability was incurred while in an unauthorized absence status. Unlike the requirements of the JAG Manual, NO showing of material interference with assigned duties is required to find a servicemember in a unauthorized absence status for disability purposes.

8407 **NOTIFICATION OF FINDINGS AND HEARING REQUESTS.** The findings of the RRP are forwarded to the Disability Evaluation Counselor nearest the member. The counselor informs the member of the findings and explains their meaning.

A. Members Found Fit. If found fit for duty, the member has 15 days to request reconsideration. There is no right to a hearing, but DIRNCPB may grant a request for one.

B. Members Found Unfit. If the member is found unfit, the member may accept the findings; CNP or CMC will either separate or retire the member. Alternately, the member has 15 days to demand a hearing before a Physical Evaluation Board Hearing Panel. Failure to respond within 15 days constitutes acceptance of the findings.

C. Incomptent Members. Members in the DES who have been determined to be mentally incompetent, per Chapter 15 of the JAGMAN, may not accept findings of the PEB. The President of the PEB will appoint counsel to represent the member, and the case is referred to a Hearing Panel following action by the RRP. If, however, the next-of-kin accepts the finding of the RRP and appointed counsel concurs, the hearing may be waived and the findings of the PEB accepted.

8408 **HEARINGS.** A member granted a hearing will receive orders to a PEB Hearing Panel. The three hearing panels are located in the Naval Hospitals at Bethesda, Maryland; Great Lakes, Illinois; and San Diego, California. The panel is composed of two line officers and a medical corps officer (different officers from those sitting on the RRP). The member is entitled to judge advocate representation at the hearing panel. Civilian counsel, retained at no expense to the government, or individual military counsel, regardless of legal qualifications, may also represent the member. Transportation and lodging are provided at government expense. The member and any desired witnesses may testify at this hearing. After hearing the testimony, the panel will close for deliberation. Although the Hearing Panel may advise the member of its findings at the conclusion of the hearing, the President reviews the record and issues the final findings of the PEB.

8409 **APPEAL.** The findings of the PEB are final unless the member petitions the DIRNCPB within 15 days of notification of findings. The Director may deny the petition or substitute his own findings for that of the Physical Evaluation Board. Petitions for relief must be based on the grounds of newly discovered evidence, fraud, misrepresentation, or other misconduct or mistake of law. The petition must be filed before separation from the naval service. Once separated, only BCNR may change the final action of the PEB.

8410 **RESERVE DISABILITY BENEFITS.** On 8 January 1990, SECNAV signed SECNAVINST 1770.3A, Subj: "Management and Disposition of Disabilities and Disability benefits for Navy and Marine Corps Reserve Components." This instruction, the first major revision since 1973, promulgates procedures for administering disabilities and disability benefits for members of the Navy and Marine Corps Reserves.

A. **Notice of Eligibility (NOE).** In the case of reservists called to active duty for less than two weeks, the medical board should be accompanied by an NOE. The NOE is a statement from the respective service indicating that the reservist was injured while serving on active duty. The NOE authorizes benefits provided under 10 U.S.C. § 1074a and 37 U.S.C. § 204 for any condition incurred during or aggravated by service requiring medical care that extends beyond termination of a period of duty. Without a NOE, a reservist serving less than two weeks may be found Unfit, but denied disability benefits.

B. **Processing.** Authority to issue an NOE has been delegated to Commander, Naval Reserve Force (003) for the Naval Reserve and the CMC (MHP

60) for the Marine Corps Reserve. If the Reserve member is deemed eligible, the case is processed in a similar fashion to the active duty service member. JAG (Code 32) acts on all appeals of denials of NOE's.

8411 **REVIEW.** The Judge Advocate General reviews all cases involving the retirement of officers; mental incompetency; misconduct, if the member has not accepted the PEB findings; all reservists and "special interest" cases. Two Attorney Advisors, Mr. Duane Fulkes and Mr. Joe Wade, are assigned to the Retirement Law Branch. Either attorney may be contacted at (202) 325-9752, AUTOVON 221-9752.

CHAPTER 85

8501

HIV+ PERSONNEL ISSUES

A. References

1. SECNAVINST 5300.30C of 14 Mar 90, Subj: Management of Human Immunodeficiency Virus-1 (HIV-1) Infection in the Navy and Marine Corps
2. SECNAVINST 12792.4 [Civilian Workforce]

B. Pre-Service. Applicants who are Human Immuno- deficiency Virus positive (HIV+) positive are not eligible for entry into the naval service. Accessions, for active duty or reserve programs, in initial military training who are determined to be HIV+ as a result of serologic testing are not eligible for military service and will be separated.

C. Testing. Military personnel (active and reserve) shall be tested for the presence of HIV antibodies to maintain the health of the force and to develop scientifically based information on the natural history and transmission of HIV, Acquired Immune Deficiency Syndrome (AIDS), and AIDS-Related Complex (ARC). Family members of active duty personnel and DoD civilian employees entitled to military medical care, on a voluntary basis, shall be tested as resources permit. Mandatory testing of civilians for serologic evidence of HIV infection is not authorized except pursuant to valid requirements by a host country. A surveillance program will be conducted (R for active duty and reserve component members, other than accessions in initial military training, to determine if HIV infection exists.

D. Retention. Active duty members who are HIV+ but who demonstrate no evidence of immunologic deficiency, neurologic involvement, decreased capacity to respond to infection, or clinical indication of disease associated with HIV+ shall be retained in the naval service.

E. Assignment Limitations. Personnel who are HIV+ can only be assigned to shore units within CONUS and within a 300-mile radius of certain medical treatment facilities. The CNO and CMC may, on a case-by-case basis, establish further limitations on assignment of such members to operational units or specific duties when deemed necessary to protect the health and safety of HIV+ members and of other military personnel (and for no other reason). SECNAV shall be advised 30

days in advance of each type of limitation in assignment or duties and the specific reasons.

F. Involuntary Separation. Military personnel who are HIV+ who demonstrate unfitting conditions of immunologic deficiency, neurologic involvement, or clinical indication of disease associated with HIV-1 infection will be processed through the Disability Retirement System under 10 U.S.C. Chapter 61 as implemented by SECNAVINST 1850.4B. Military personnel retained on duty but who are found not to have complied with the directives given during lawfully ordered preventive medicine procedures, are subject to appropriate administrative and disciplinary actions including separation for cause.

G. Voluntary Separation. A member who is HIV+ and retained on active duty may request voluntary separation under the following guidelines:

1. Members may apply for separation because of HIV-1 positivity within 90 days after initial medical evaluation and classification is completed. The 90-day period begins the day the medical board report of HIV-1 positivity is signed by the member. Personnel requesting separation after the 90-day period has expired will be considered on a case-by-case basis. Separation may be delayed up to 180 days after initial evaluation in order to minimize manning shortfalls and to provide for continuity of functions. Members who volunteer for separation will be processed for convenience of the government due to compelling personal need. The discharge shall be characterized as warranted by service record. Members who elect separation will not be allowed re-entry into the service at any later date.

2. The CNO and CMC will normally deny the request if the member:

- a. Is serving in a field which is experiencing a significant personnel shortage that justifies retention;

- b. Has not completed obligated service incurred for for DoN training or education; or

- c. Was notified of HIV+ and later executed orders or entered a program requiring obligated service.

3. The command must counsel the individual on the potential for lost benefits, resulting from a voluntary separation. The member's request for separation must document lack of implied pressure or coercion, implied or otherwise.

4. Members voluntarily separated from the active force by reason of HIV-1 positivity who have a remaining military obligation, will be transferred to the Standby Reserve Inactive unless there are other medical reasons why the member would not be available to meet mobilization requirements.

H. Confidentiality and Disclosure. HIV+ test results must be treated with the highest degree of confidentiality and released to no one without a demonstrated need to know. Strict compliance with the provisions of the Privacy Act instructions in SECNAVINST 5211.5C is required. All command and medical personnel with access to such information must ensure careful, limited distribution within the specific guidelines of paragraphs 12c, and 15 of SECNAVINST 5300.30C to affirmatively combat unfounded innuendo and speculation about the meaning of the information. Additional penalties for unauthorized disclosure may be imposed under 10 U.S.C. § 1002.

I. Adverse action. Servicemembers may not be processed for separation nor have UCMJ action taken based solely on an HIV+ blood test or the epidemiological assessment interview which is conducted by the medical treatment facility. Administrative separation processing for drug abuse or homosexuality or any action under the UCMJ must be based on independent evidence. Test results cannot be reflected in fitness reports or enlisted evaluations; HIV positivity does not affect promotions. United States v. Morris, 25 M.J. 579 (A.C.M.R. 1987), remanded, 26 M.J. (C.M.A. 1988)(Blood test inadmissible as a matter of policy in Gov't's case-in-chief); United States v. Womack, 29 M.J. 88 (C.M.A. 1989)(Safe-sex order held lawful); United States v. Johnson, 27 M.J. 798 (A.F.C.M.R. 1988)(Unsafe sex after counseling supported conviction for aggravated assault, despite failure to warn of possible disciplinary consequences); United States v. Stewart, A.C.M.R. 8702932 (9 Sep. 1988 unpublished) (Accused pled to assault with a means likely for intercourse without warnings.) Similarly, the presence of AIDS or the HIV antibody will not, by itself, be the basis for any adverse personnel action against a civilian employee.

J. Protective Orders. Members who are HIV+ may be ordered, for example not to have unprotected sex and to inform future sexual partners of their condition. Violation of these orders is punishable by court-martial under Article 92. United States v. Woods, 28 M.J. 318 (C.M.A. 1989) (legal sufficiency of safe-sex order). A sample order appears at the end of this chapter.

K. Medical Interview Information. The term epidemiologic assessment interview means that part of the medical assessment of an HIV+ member where the questioning of the member is for the direct purpose of obtaining epidemiologic or statistical information regarding the occurrence, source, and potential spread of the

infection. The epidemiologic assessment interview will be conducted by the interviewing health care professional during the medical evaluation used to determine the possible mode of transmission and the status of potential infection.

1. Information obtained from a service member during or as a result of an epidemiologic assessment interview may not be used against the member in: the government's case-in-chief in a court-martial; nonjudicial punishment; involuntary separation (other than for medical reasons); administrative or disciplinary reduction in grade; denial of promotion; an unfavorable entry in a personnel record; bar to reenlistment; and any other action considered by SECNAV to be an adverse personnel action.

2. The limitations above do not apply to: the introduction of evidence for impeachment of rebuttal purposes in any proceeding in which the evidence of drug abuse or relevant sexual activity (or lack thereof) has been first introduced by the member or to disciplinary derived evidence; or, nonadverse personnel actions such as reassignment, disqualification (temporary or permanent) from a personnel reliability program, denial, suspension or termination of access to classified information, and duties requiring a high degree of stability or alertness such as flight status, explosive ordinance disposal, or deep-sea diving. Nonadverse personnel actions which are supported by serologic evidence of HIV infection shall be accomplished under governing Naval regulations, considering all relevant factors, on a case-by-case basis.

3. While not prohibited by the letter of SECNAVINST 5300.30C, use of interview information against another servicemember would probably violate its spirit. The rule exists to promote candor in the interview; collateral use would likely have a chilling effect on the willingness of soldiers to provide this information.

L. Points of Contact. Navy policy: OP-136, AV 224-5562; Assignment: NMPC 453, AV 224-3785; Retention: NMPC 831, AV 224-8223. Marine Corps: MPP 39, AV 224-1931/1519.

SAMPLE ORDERS TO HIV+ PERSONNEL**SENSITIVE - FOR OFFICIAL USE ONLY****COMMAND ORDERS TRANSMITTAL FOR HIV POSITIVE PERSONNEL**

I am issuing the following orders to you:

1. Prior to engaging in sexual activity, or any activity in which your bodily fluids may be transmitted to another person, you must verbally advise any prospective sexual partner of your HIV positivity and the risk of possible infection.
2. If your partner consents to sexual relations, you shall not engage in sexual activities without [your][your partner's] use of a condom.
3. Before engaging in sexual relations, you must advise your potential sexual partner that the use of a condom does not guarantee that the virus will not be transmitted.
4. You shall not donate blood, [sperm], [breast milk], body tissue, organs, or other body fluids.
5. You shall not share personal implements, including but not limited to, toothbrushes and razors with other individuals. This provision does not preclude visits to licensed barbers or beauticians.
6. You must provide advance notification of your HIV positivity to all health care workers who will be providing medical or dental care to you.

IMPORTANT: Your failure to comply with these orders may subject you to disciplinary action under the UCMJ and/or administrative separation.

I acknowledge understanding of the above orders.

Member's Signature

Date

Orders transmitted, and member's signature witnessed by:

Signature: _____

Printed Rank, Name, SSN, and date

Distribution:

Mail original to: NMPC-453, Washington, DC 20370-5453

Certified copy to: Member and Commanding Officer's file

SENSITIVE - FOR OFFICIAL USE ONLY

CHAPTER 86**TRUSTEESHIPS FOR INCOMPETENT MEMBERS**

8601 **INTRODUCTION.** Per 37 U.S.C. §§ 601-604, SECNAV has delegated authority to the JAG to administer the Navy trustee program. Chapter XIV, JAG Manual explains the trustee program. The trustee program includes members of the Navy or Marine Corps on active duty (other than for training) or on the retired list of the Navy or Marine Corps and members of the Fleet Reserve or Fleet Marine Corps Reserve.

8602 **BACKGROUND.** Each year hundreds of servicemembers become mentally incompetent due to injury or disease. A member is declared incompetent by a competency board convened by a Naval medical facility or a Department of Veterans Affairs Medical Center. The competency board consists of three physicians, one of whom must be a psychiatrist. Trustees are appointed to administer the military pay of members who have been judged mentally incapable of managing their financial affairs. The member's pay becomes an immediate issue, especially if the member has dependents

8603 **TRUSTEE SELECTION.** On receipt of the report of the competency board, the JAG requests field judge advocates or Naval Reserve Center personnel to interview prospective trustees. The interviewing officer is provided complete instructions pertaining to the interview including forms required to be completed by the prospective trustee that will be returned by the interviewing officer to JAG. A copy of the letter (with enclosures) providing instruction to the interviewing officer follows.

8604 **INTERVIEWING OFFICER DUTIES.** The interviewing officers duties include:

A. Assisting the prospective trustee in obtaining the surety bond required under 37 U.S.C. 601-604;

B. ascertaining that the prospective trustee is willing to execute an affidavit acknowledging that all monies will be used for the member and his legal dependents; and

C. forwarding recommendations regarding the suitability of the prospective trustee to the Judge Advocate General for appropriate action.

8605 **POINT OF CONTACT.** The point of contact for the trustee program is OJAG, Civil Affairs Division (Code 32).

SAMPLE FIELD INTERVIEW OFFICER REQUEST

From: Judge Advocate General

To:

Subj:

Ref: (a) JAGMAN, Chapter XIV

Encl: (1) NAVJAG Form 5800/24, Affidavit Form

(2) DD Form 462, Surety Bond Form

(3) Privacy Act Statement, Interview

(4) Privacy Act Statement, Surety Bond

(5) Privacy Act Statement, Annual Accounting Report

(6) NAVJAG Form 5800/13 and 13A, Sample Accounting Forms

1. Per reference (a), please designate an officer to interview subject prospective trustee and recommend whether that person is suitable to be appointed trustee to receive the military pay of subject member who has been declared mentally incapable of managing his or her affairs.

2. The interviewing officer should ascertain to what extent any person is legally dependent upon the member for support, and whether a legal guardian, conservator, or committee has been or is to be appointed by a State court of competent jurisdiction. In the event a legal representative has been appointed, the officer should obtain a certified copy of the court appointment and send it to this office (Code 32) using the address shown in the letterhead. After the certified copy has been mailed, no further action is required by the interviewing officer as in most cases no trusteeship is necessary in these circumstances.

3. If the interviewing officer considers the prospective trustee unsatisfactory for any reason, interview and recommend any other relative of subject member in the area and considered qualified as a prospective trustee. If the new prospective trustee is not within the interviewing officer's locality, the interviewing officer should furnish us the name, relationship, and address of the new prospective trustee in order that we may then order an interview with such person. Return this letter and enclosures with the recommendation.

4. The interviewing officer should also report: (a) name, relationship, ages if available, and addresses of all immediate relatives including spouse, children (show dates of birth), parents, brothers, and sisters of subject member; and (b) extent to

which any person is legally dependent upon subject member for support. In the event a parent claims dependency, provide the date from which dependency is claimed along with the amount of allotment the member registered in behalf of the claimed dependent parent.

5. If the recommendation is favorable and a legal guardian has not or will not be appointed, the interviewing officer should advise the prospective trustee that it is necessary to execute the enclosed affidavit, enclosure (1), and to secure a corporate surety using the enclosed bond form, enclosure (2). The interviewing officer should assist the prospective trustee in obtaining a corporate surety by first suggesting that the prospective trustee contact his or her personal insurance agent for information about obtaining the required surety bond. If the prospective trustee does not have a personal insurance agent, the interviewing officer should continue to assist the prospective trustee in obtaining the surety bond. The bond should be executed by both the prospective trustee and the corporate surety. The corporate seal should be affixed along with the name and complete address of both the corporate surety and its agent. Advise the prospective trustee that the surety bond is required by law and cannot be waived. Also, advise the prospective trustee that the bond can only be released by the Judge Advocate General and that the trustee is responsible for paying the annual premium and sending the receipt for the annual premium to this office with the annual accounting report. The premium for this bond is reimbursable from the monies received under the trusteeship and is not reimbursed directly by the Department of the Navy. The executed surety bond and affidavit should then be forwarded to this office together with the interviewing officer's report and recommendation. Advise the prospective trustee further that detailed instructions will be issued upon appointment, that these instructions must be followed very carefully, and that the trustee may seek assistance from this office at any time.

6. Provide the prospective trustee with a Privacy Act statement at the beginning of the interview in the form of enclosure (3), and explain the statement in detail. If the interviewing officer's recommendation with respect to the prospective trustee is favorable, advise the prospective trustee that the bond form (DD Form 462), enclosure (2), is subject to the Privacy Act. The interviewing officer shall provide the prospective trustee Privacy Act statements, enclosures (4) and (5), for retention prior to requesting completion of enclosures (1) and (2). Enclosure (6), a sample copy of the accounting forms, is for the prospective trustee's information at this time and is also subject to the provisions of the Privacy Act. Upon appointment of the trustee, we will provide a supply of accounting forms along with a due date for the first annual accounting report.

7. Please complete the prospective trustee interview and return a report, and completed enclosures (1) and (2) to this office within 20 working days from receipt of this request.

8. Our point of contact is the Head, Fiduciary Affairs Branch, Civil Affairs Division, telephone (703) 325-9752, AUTOVON 221-9752. The interviewing officer may call this office prior to conducting the interview for additional information or instruction.

By direction

Copy to:

GENERAL INSTRUCTION TO TRUSTEES

The Office of the Judge Advocate General (Civil Affairs Division) administers the trustee program for the Navy and Marine corps. Any questions pertaining to the trustee program should be directed to this office. The following information is provided to help you in the performance of your duties and to advise you of your responsibilities as trustee:

1. FIDUCIARY RESPONSIBILITIES AND DUTIES

a. You have been appointed trustee in accordance with an Act of Congress, 37 United States Code §§ 601-604 (1988), and regulations issued pursuant to that Act. You are being entrusted with pay or allowances due a member or former member of the naval service who has been determined to be incompetent to manage his or her own financial affairs. Your appointment as trustee by the Department of the Navy does not authorize you to act as trustee or guardian for any income or benefits from any other source except interest or dividends received from trustee bank accounts opened with funds received from the Department of the Navy. A trusteeship regarding such other funds would have to be authorized by another federal or state agency or a court of competent jurisdiction.

b. You are personally accountable for all funds paid to you by the Department of the Navy on behalf of the incompetent member or former member of the naval service. Your duty is to manage and conserve monies received in behalf of the member. Accordingly, it is extremely important that you comply with these instructions and all other instructions issued by this office.

c. You are expected to perform faithfully your duties as trustee. If you fail to comply with all instructions issued you by this office, it may become necessary to suspend further payments to you, terminate your trusteeship, and take action to recover from you any monies used improperly. Federal law requires that you serve without fee or charge for services rendered in connection with your trusteeship. Except for the premium on your surety bond, you are not authorized to use trustee funds to pay any fee or commission for any legal or other service rendered in connection with the establishment or administration of the trusteeship.

d. Your trusteeship authorizes you to receive only monies paid by the Department of the Navy for all active duty pay and allowances, amounts due for accrued or accumulated leave or retired pay due or to become due the member. Disbursements made by you from these monies must be for the sole use and benefit

of the member, the lawful spouse and minor children, if any. Determination of dependency of other family members will be made in advance by the Judge Advocate General, Department of the Navy, 200 Stovall Street, Alexandria, Virginia 22332-2400.

e. As trustee, you are required by law to submit an accounting report annually, and at such other times as directed by this office. Your accounting report should be mailed to the Office of the Judge Advocate General (Code 32), Department of the Navy, 200 Stovall Street, Alexandria, Virginia 22332-2400. Your accounting report must be signed and expenditures must be substantiated by receipts or cancelled checks for every expense exceeding \$200.00. Additionally, the most recent trustee bank statements showing the name and address of the bank, the name in which the account is maintained, and the balance of the account at the end of the accounting period must accompany the accounting report. A receipt showing that the annual surety bond premium has been paid must be submitted with the annual accounting report. Upon your appointment as trustee, accounting forms are provided and a due date established when the first accounting report is required. Timely submission of accounting reports is your responsibility. We do not send notices of accounting due dates. Failure to submit your accounting report by the due date may result in suspension of further trustee payments to you until a proper accounting report is received by the Judge Advocate General.

2. INCOME AND EXPENSES

a. Upon receipt of your first check from the Navy or Marine Corps Finance Center, you should open a trustee checking account in a Federally-insured bank in your name as trustee for the member. (Example: Mary Jones, trustee for John A. Jones.) A copy of your initial deposit slip must be forwarded to this office at this time. Trustee funds should not be deposited in your own personal bank account and should not be combined with any other monies. Investment of trustee funds in any account other than a checking and/or saving account in a Federally insured bank must receive prior written approval from this office.

b. Federal law requires that you obtain and execute a surety bond. The initial cost and annual premium renewal of your corporate surety bond are authorized expenditures. You should obtain a paid receipt for this expenditure each time payment is made and forward the receipt to this office with your annual accounting report.

c. Limited sums of money (\$200.00 or less) may be held in cash. Receipts are not required for each expenditure under \$200.00 made in the interest of the member

or his or her legal dependents. Except for day-to-day living expenses for food, minor household needs and small purchases such as medical supplies, newspapers, magazines, postage, entertainment, tobacco products and other sundries, paid receipts should be requested and retained by you in support of all trustee funds spent in behalf of the member and his legal dependents. All other expenses such as mortgage or rent payments, insurance, the cost of the premium on your surety bond (which is authorized to be paid from the trustee account), medical or dental bills, utility bills and other major expenses and bills should be paid by check. If paid in cash, a signed receipt must be obtained for payment.

d. If the member is hospitalized in a Department of Veterans Affairs medical facility, you may be required to provide funds for his personal needs. The amount required will be specified by the Director of the Veterans Affairs medical facility. You are authorized to expend trustee funds for this purpose.

e. You are prohibited from using or obligating trustee funds for expenditures in excess of \$200.00 for such items as jewelry, furniture, clothing, household appliances or for the purchase of an automobile, house or lot, or farm equipment without prior approval of the Judge Advocate General.

f. Church donations in behalf of the member should not exceed five percent (5%) of the trustee funds received.

g. Loans may not be made from trustee funds to anyone for any reason.

h. Trustee funds may not be spent for gifts for anyone other than the lawful spouse and legally dependent children without prior approval of the Judge Advocate General.

i. Purchase of new life insurance, must have prior approval. House, property, and automobile insurance not in effect prior to your trustee appointment must also receive prior approval of the Judge Advocate General.

j. Reasonable allowances will be authorized from trustee funds for travel expenses incurred by you in execution of your trustee duties. These expenses must have prior approval from this office and must be included in the accounting report.

k. Your accounting report should be maintained up-to-date to expedite the timely submission of the annual accounting to this office. Your trusteeship records are subject to audit at all times by this office. In any event your accounting report together with paid receipts or cancelled checks or other evidence of purchase should

be readily available for review at all times. All accounting records will be returned to you.

3. MISCELLANEOUS

a. The Office of the Judge Advocate General Department of the Navy, 200 Stovall Street, Alexandria, Virginia 22332-2400, must be notified immediately of any change in the status affecting the trusteeship such as the death or disappearance of the member; appointment of a legal guardian, committee, or conservator by a State court; divorce or legal separation of the member; death of dependents; change of status of dependents, including minor children becoming of age; change of address of member and/or trustee; inability of trustee to perform his duties; death of trustee. You must also advise the Judge Advocate General when the military pay has been waived in order to receive Veterans Administration compensation.

b. Your trustee records are subject to audit at all times by the Judge Advocate General to insure that the best interests of the member are being fulfilled. In any event, your accounting report together with paid receipts, sales slips and cancelled checks should be readily available for review if requested. All records will be returned to you upon completion of any audit.

PROSPECTIVE TRUSTEE INTERVIEW

1. AUTHORITY: 37 U.S.C. SEC 601-04 (1976)
2. PRINCIPLE PURPOSE(S): to determine the need for and suitability of the prospective trustee to serve as the financial manager for a particular member or former member medically determined to be mentally incapable of managing his financial affairs and to identify persons dependent upon the member for support.
3. ROUTINE USES: Information provided in the interview is used in connection with the administration of payments to a trustee for an incompetent member or former member of the naval service and may be furnished to the Department of Justice for litigation to recoup liability incurred by the trustee and/or surety and for prosecution for malfeasance. Additionally, it may be furnished to the Veterans Administration, where appropriate, in connection with the administration of programs administered by that agency.
4. DISCLOSURE MANDATORY/VOLUNTARY CONSEQUENCES OF REFUSAL TO DISCLOSE: Disclosure is voluntary, but designation of an individual as trustee will be precluded if the necessary information is not provided.

BOND OF PERSON DESIGNATED TO ACT ON BEHALF OF INCOMPETENT MEMBER OR FORMER MEMBER OF THE UNIFORMED SERVICES

1. AUTHORITY: 37 U.S.C. SEC 601-04 (1976)
2. PRINCIPAL PURPOSE(S): To provide surety bond for an individual designated as trustee to receive payments to an incompetent member or former member of the uniformed services.
3. ROUTINE USES: Information provided in the interview is used in connection with the administration of payments to a trustee for an incompetent member or former member of the naval service and may be furnished to the Department of Justice for litigation to recoup liability incurred by the trustee and/or surety and for prosecution for malfeasance. Additionally, it may be furnished to the Veterans Administration, where appropriate, in connection with the administration of programs administered by that agency.

4. DISCLOSURE MANDATORY/VOLUNTARY CONSEQUENCES OF REFUSAL TO DISCLOSE: Disclosure is voluntary, but designation of an individual as trustee will be precluded if the necessary information is not provided.

NAVJAG FORM 5800/13 PRIVACY ACT STATEMENT

ANNUAL OR FINAL ACCOUNTING REPORT

1. AUTHORITY: 37 U.S.C. SEC 601-04 (1976)
2. PRINCIPAL PURPOSE(S): To determine compliance with the terms of the appointment as trustee to serve as the financial manager for a particular military member or former member medically determined to be mentally incapable of managing his financial affairs.
3. ROUTINE USES: Information provided in the interview is used in connection with the administration of payments to a trustee for an incompetent member or former member of the naval service and may be furnished to the Department of Justice for litigation to recoup liability incurred by the trustee and/or surety and for prosecution for malfeasance. Additionally, it may be furnished to the Veterans Administration, where appropriate, in connection with the administration of programs administered by that agency.
4. DISCLOSURE MANDATORY/VOLUNTARY CONSEQUENCES OF REFUSAL TO DISCLOSE: Disclosure is mandatory.

SAMPLE AFFIDAVIT

AFFIDAVIT

COUNTY OF _____

ss

STATE OF _____

_____, now residing at
_____, being first duly
sworn, deposes and says:

That pursuant to the Act of September 7, 1962, Public LAW 87-649, 76 Stat. 483 (37 USC 601-604), and regulations promulgated by the Secretary of the Navy for the administration thereof, affiant contemplates being appointed trustee to receive from the United States Government any active duty pay and allowances, or any amounts due for accumulated or accrued leave, or any retired pay, otherwise payable to a mentally incompetent member of the uniformed services.

That any monies henceforth received by virtue of such appointment as trustee will be applied to the use and benefit of said incompetent, and that no fee, commission or charge will be demanded by affiant, or in any manner accepted, for any service or services rendered in connection with such appointment as trustee.

That affiant will file annually with the Fiduciary Affairs Branch, Office of the Judge Advocate General, 200 Stovall Street, Alexandria, VA 22332, and at such other times as directed an accounting report, which shall show all funds received in behalf of said incompetent, all expenditures made on behalf of said incompetent, including living expenses of the dependent spouse and minor children (and only such other dependents of said incompetent as approved by the Judge Advocate General), accompanied by receipts or vouchers as instructed covering each expenditure, and a statement of the condition of the trust account at time of submission of the accounting report to the Judge Advocate General.

That affiant will request permission from the Judge Advocate General to make expenditures over and above amounts fixed by the Judge Advocate General, or expenditures of an unusual nature, and that no improper use will be made of the monies received on behalf of the incompetent.

Affiant further deposes that he/she will faithfully comply with the applicable provisions of said Act of September 7, 1962, the said regulations promulgated by the Secretary of the Navy, any other acts as directed by the Judge Advocate General, 200 Stovall Street, Alexandria, VA 22332; and do all acts in the manner required by affiant as trustee.

_____ (seal)

Subscribed and sworn to before me this _____ day of _____ 19__

Notary Public in and for the
County of _____
State of _____

PART IX: GENERAL SJA TOPICS

CHAPTER 91

TOTAL QUALITY LEADERSHIP (TQL)

9101 DON EXECUTIVE STEERING GROUP GUIDANCE.

The following is taken from a memorandum by H. Lawrence Garrett, III, Secretary of the Navy.

A. Background. There can be few individuals in management or leadership roles in the Department of the Navy who have not heard of Total Quality Management, or, more recently, Total Quality Leadership. Several years ago I became involved in quality through learning how the Navy Industrial Improvement Program was beginning to focus on quality improvement. The principles of this initial quality focus were embodied in the DON Productivity Improvement Guiding Principles signed in 1987 by the Secretary of the Navy, Chief of Naval Operations, and Commandant of the Marine Corps. In November 1988, when I served as Under Secretary of the Navy, I became convinced that quality is the key to our continued success. I emphasized quality improvement as a top priority initiative to achieve performance improvement on a continuing basis. Early in 1989, I formed the DON Executive Steering Group (ESG) to take a leadership role in developing and refining the DON "quality," approach which had been defined in the Department as Total Quality Management (TQM). TQM is the application of quantitative methods and people to assess and improve:

1. Materials and services supplied to the organization;
2. All significant processes within the organization; and
3. Meeting the needs of the end user, now and in the future.

B. The Deming Approach. TQM is largely based on the principles and longstanding work of W. Edwards Deming, the American statistician primarily credited with transforming Japan to its position as a major economic world power. While there are other approaches to quality improvement, Deming's emphasizes leadership responsibilities and integrates process improvement methods with new methods for leading people. TQM is consistent with this approach, but was developed within the DON shore establishment to be applicable to the Department's requirements and unique characteristics. TQM is a systems approach to managing work and leading people, an approach which we have typically not applied to our

private and public sector organizations. It requires top-down leadership focusing on quality, user needs and requirements, and improvements and innovations of strategically important processes through fact-based decision making and management of team participation.

C. Purpose. My intention in this paper is to describe and emphasize the Department of the Navy's top leadership commitment to quality improvement. I will share some common definitions and describe the overall direction of the Department's quality focused transformation. I will also outline the Executive Steering Group's activities during 1990. The ESG contributed significantly to the definitions and direction outlined below.

D. Why the DoN Needs to Improve Quality. Our Department, the Navy and Marine Corps, finds itself at a crossroads in its history. World events and the condition of our nation's economy provide intense pressure to reduce defense expenditures. At the same time the requirement to equip, maintain, and field combat ready forces is and will continue to be essential to the freedom of our nation.

1. The need for forward deployed Naval forces and for properly trained, equipped Sailors and Marines to provide the requisite degree of deterrence may well outstrip resources available to the Department -- if we do not make major improvements in the way we operate. Maintaining Naval strength under significantly reduced finding and manning levels demands that we become more efficient and effective, and we must do this with considerable urgency.

2. Commitment to quality improvement is the way the Naval service can maintain its effectiveness. It has been demonstrated in this country recently, and in Japan for over 40 years, that by improving quality, dramatic reductions in costs and increases in productivity can result. Continual improvement in processes through careful application of a system of principles and methods can make the needed difference. Shore commands that have initiated quality-focused efforts have already shown significant improvements, and we have learned much from these successes.

E. What is Total Quality Leadership? The Chief of Naval Operations, the Commandant of the Marine Corps, and I are committed to improved quality by banding the TQM effort to the operational forces. In acknowledgement of the unique role of leadership in military operational commands, and the fact that military personnel generally disfavor the word "management, we have decided to use "Total Quality Leadership (TQL)" as the title for the quality principles, approach, and methods that will be used throughout the Department of the Navy. We have taken action to promote a common understanding of quality to ensure consistency throughout the Department of the Navy. We cannot overstate our belief that quality is the responsibility of Navy and Marine Corps leadership and cannot be delegated.

1. The term TQL, emphasizing "leadership," focuses attention on the new responsibilities of "Command," while recognizing that existing responsibilities and accountability will not be compromised. TQL does not alter the traditional responsibilities of line officers or non-commissioned officers. The term is used to reflect the enhanced responsibilities of "Command."

2. TQM and TQL are consistent approaches to quality with the same foundation. The "management" in TQM refers to systems for managing work (e.g., acquisition), and systems for managing people (e.g., personnel). Eventually, changes in both systems will be needed for significant quality improvements to be realized. "Management" in a quality organization does not mean just taking care of day-to-day business. Leaders are responsible for improving systems so they will meet current and emerging requirements. Leading change will become the core of their new tasks in the future. Leadership is paramount as "quality is made in the board room, not on the factory floor" (Deming, 1988), or as paraphrased by the CNO "quality is made in the wardroom, not at the deckplate." Quality is leadership driven.

3. While TQL principles and related methods are applicable to all systems, we recognize that operational requirements aboard ship, and combat command environments involve systems that are different from shore support activities. The application of TQL in the fleet must address these differences. Nevertheless, process improvements can be made through the use of analytical methods and tools. The major emphasis in operational environments will be made on leaders learning to change the way they work with subordinates, gather information, make decisions, and improve the quality of operational performance.

4. TQL is not just a set of statistical methods, charts, and exhortations to "do more with less." It is not a collection of slogans or "buzz words." TQL is also not a "program" to be delegated to the lowest levels within an organization. Nor is it an umbrella concept for all productivity and cost savings efforts.

5. TQL is an approach to leading and managing that is guided by a total view of how all systems of work and people blend together to meet mission requirements, and ultimately perform the service for our country. TQL is a bottom-line approach to assess and improve continually the processes by which an organization conducts its business. Lowered operating costs, increased satisfaction on the part of the customer or end user, increased productivity, and improved operational readiness will result as quality improves.

F. What is DoN Doing About Quality? The Executive Steering Group (ESG) is presently chaired by the Under Secretary of the Navy, Dan Howard, and consists of 25 leaders in the DON. Members include the Vice Chief Naval Operations; Assistant Commandant of the Marine Corps; all Assistant Secretaries of the Navy; Chief of Naval Personnel; Deputy Chief of Naval Operations (Logistics); all

Systems Commanders; Chief of Naval Education and Training; Commander, Military Sealift Command; Surgeon General; and Commanding General, Marine Corps Research, Development, and Acquisition Command.

1. The ESG's purpose is to lead and guide the TQL transformation throughout the Navy and Marine Corps, beginning with shore support activities through their demonstrated leadership. Specifically, the initial ESG role is to define quality for the DON shore establishment, and develop its purpose, vision, guiding principles, and goals. It will develop policy guidance, support TQL education and training deployment, identified and remove barriers to improvement, and develop mechanisms for evaluating and integrating quality into Navy and Marine Corps policies, practices, and procedures. The ESG has identified the following purpose for the shore establishment of the Department of the Navy: To provide the Sailor and Marine with the ability to go anywhere, anytime to defend the nation's interests successfully and survive.

2. The ultimate user of products and services is the Sailor and Marine. Everyone in the Navy and Marine Corps (whether in operational functions, direct support functions, headquarters, etc.), must recognize their responsibility ultimately to contribute to the mission of the operational forces.

G. Education and Training for TQL. The first task the ESG focused on was education and training to develop informed leaders able to take on their enhanced role. An Education and Training Quality Management Board was chartered to develop a training plan. The plan is nearing completion and steps have begun to execute the plan. The first course under development is a one week Senior Leaders Seminar, primarily aimed at Commanding Officers and their civilian counterparts. Instruction will begin calendar year 1991 at the Naval Postgraduate School and will be expanded to other sites. The intent of the seminar is to prepare leaders to begin TQL implementation at their activities. The seminar covers such areas as introductory concepts and principles, basic tools and graphic methods, strategic planning elements, implementation guidelines, and roles and responsibilities of leaders.

H. Quality Support Center (QSC). The ESG has sponsored and chartered the QSC (located at NPRDC) to support the DON. The QSC serves as a clearinghouse for information on quality, provides technical review for TQL materials, certifies and conducts follow-up evaluation of DON-sponsored courses, and delivers a limited number of TQL seminars. Currently, the QSC provides DON technical reports and case studies, and recommends readings and videos. It also delivers in San Diego a one-day Introduction to TQL and a three-day Implementation Seminar for leaders of TQL and their coordinators. The Introduction to TQL is aimed at leaders in organizations to orient them in the basic principles and concepts of quality. The Implementation Seminar provides guidance on how to get started organizing and planning for quality in shore support activities. Updates on services the QSC can

provide will follow later.

1. Continuing ESG Activities. In accordance with TQL principles ESG members have accepted their ongoing personal obligation to become educated in quality. As of the end of 1990 ESG members have participated in a one-day Introduction to TQL, attended in-house presentations on Systems Thinking, a two-day session on TQL Implementation, and a four-day Deming Seminar. Members also completed extensive reading and exercises in preparation for an ESG strategic planning session conducted at NAS, Pensacola, September 1990. The ESG returned from that four-day intensive strategic planning session in Pensacola with consensus on a number of important issues that provide the strategic foundation for planning for quality in the DON. The group developed a vision for the Department's support establishment consistent with TQL, identified guiding principles to support that vision, developed strategic goals to move toward the vision, and clarify the charter and role of the ESG. The ESG's vision and guiding principles have been approved by CNO, CMC, and myself, and are attachments to this document. Tasks to further develop and clarify the strategic goals have been assigned to individual ESG members. As these goals and their supporting objectives are approved by the ESG, they will be made available.

1. The ESG is working to align the quality efforts being initiated in the operational forces with those in shore support activities sponsored by the ESG. At the CINCs conference in October 1990 in Annapolis, MD, the CNO devoted an entire day to planning for TQL implementation. Initial "demonstration" projects in operational units will be started under the guidance of teams of military personnel trained in quality principles and applications. The VCNO will serve as the liaison between the ESG and the CNO's initiatives to ensure consistency with the overall aim of DON-wide system optimization.

2. The ESG is supporting research on TQL in areas such as:

- a. Providing feedback on TQL transformation;
- b. Giving objective basis for DON quality award;
- c. Improving customer/supplier feedback systems; and
- d. Promoting teamwork efforts.

3. In addition, the ESG is reviewing existing management improvement programs such as Efficiency Reviews, Commercial Activities, DON Productivity Program, Suggestion Program, and others. They will be evaluated for consistency with TQL and duplication across programs. Until that review is completed, these programs are to remain in effect.

J. Summary. Our Department is at a crossroads in its history. It can continue on its present course and try to do more with less using traditional approaches or it can chart a new course. The CNO, CMC, and I have chosen a new course. That course is improved quality in support of the Sailor and Marine. By improving quality we can and will provide the nation with the Navy and Marine Corps it must have to meet the demands of this decade of change and those of the next century.

1. Your task as leaders in the Navy and Marine Corps is to become educated in quality concepts and guide the application of the principles within your Commands. We realize that some Commands are at the threshold of implementing TQL, while others have made considerable progress in process improvements. We hope this paper helps you to think about what quality means to you in your organization, and how your improvement efforts support the ESG's direction and guidance.

2. The most important action you can take now is to begin your education in quality. "Quality control begins and ends with education" (Ishikawa, 1986). The number of publications related to TQL is enormous. I recommend the following books to begin your personal study in the foundations of the Department of the Navy's quality transformation:

- a. The Deming Management Method by Mary Walton (1986)
- b. Out of the Crisis by W. Edwards Deming (1986)
- c. Deming Route to Quality and Productivity by William Scherkenbach (1986)
- d. The Transformational Leader by Noel M. Tichy and Mary Anne Devanna (1986)
- e. Deming Management at Work by Mary Walton (1990)

3. I believe Total Quality Leadership is a systematic approach that will enable us in the DON to meet the challenge of declining resources and continue to provide the strong maritime defense essential to our nation.

9102 **IMPROVING WITH QUALITY** by ADM Frank B. Kelso II, CNO

A. Today's demanding geopolitical and fiscal environments pose unique challenges and offer unique opportunities for the Navy. More than ever, we need to do our duties efficiently and safely. Flexibility, responsiveness and readiness, our hallmarks, will increasingly characterize naval operations of the future. The growth which characterized the Navy in the Eighties will not continue into the Nineties.

While we work to ensure we have the resources available to do the duty with an acceptable degree of risk, we will not have the quantities available to us that we have had in the past. That is the reality of 1990 and beyond.

B. We need something to take up the slack, and that something is quality. Combat readiness is the Navy's product, and that remains the constant in the equation. However, quality will become ever more important as our overall force levels and budgets decline. In business terms, we need to achieve and maintain the superiority of the Navy product and improve it continuously.

C. Slick hype campaigns and catchy slogans are not what I have in mind. Nor do I want to impose another check list or inspection upon our sailors. Instead, I want us to structure a quietly effective effort to improve quality in the Navy which makes sense to our people, helps them get the job done properly, and helps us all manage our resources better.

D. The Navy already is the leader in applying quality-centered management in the shore establishment. Their approach is called "Total Quality Management." This management philosophy, taught in Japan by Dr. W. Edwards Deming, has been credited with many of the dramatic successes of Japanese industrial improvements in quality. I want to continue that initiative ashore and expand it to include the Operating Forces.

E. I've decided to call our approach for the Operating Forces "Total Quality Leadership: (TQL) because of the unique role that Navy leadership plays in developing and implementing our operational objectives. Since TQL is a management philosophy, we will need to adapt its approach and techniques to the Navy operational environment--its processes, procedures and "products."

F. The message of TQL is revolutionary and it changes what we should expect from ourselves and our sailors. Its central theme is the need to identify, analyze, improve and redesign the individual processes of our operations in order to improve and redesign the product. TQL's primary thrusts are the continuous improvement of quality; total commitment to meeting the needs of the "customer;" emphasis on improving product quality through improvement of process; and focus on leadership, training and personnel management.

G. In the Navy, the Secretariat is applying these principles to the acquisition process, and numerous Navy shore commands have already adopted its methods with positive results well beyond original expectations. It's time now for us to expand this to the entire Navy, including the Operating Forces.

H. To be effective, we must keep TQL targeted on the practical payoff we expect: continuous improvements in processes to produce continuously improving results. I am convinced TQL can be applied to solve problem areas in ships,

squadrons and shore commands and strengthen our overall performance and readiness.

I. By way of example, take a ship in REFTRA which is having problems setting Condition ZEBRA in an acceptable time. Familiar and perhaps typical responses might be some combination of exhortations, threats, blame-laying and "motivation" though repetitive drilling. Maybe these work, maybe they don't. The problem is that, all too often, no one really sits down to analyze the situation - they just say "fix it." With a TQL approach, emphasis instead would be on analyzing the entire ZEBRA-setting process, reviewing component processes for each repair party and zone, collecting data to identify causes of problems, and then determining ways to solve those problems.

J. Causes might include insufficient manning, poorly identified ZEBRA fittings, poorly designed fittings, unclear assignment of responsibility for specific fittings, inefficient division of effort, improper or insufficient training, inadequate supervision, or poor communications. Once identified, the roots of these problems could be eliminated. The examinations of these problems ZEBRA-setting process would be accomplished not only by officers and chiefs, but would rely on the active participation of the repair parties themselves. Statistical analysis and elementary timing and measuring techniques would be used to help identify and chart the glitches. Most importantly, while the solution that the TQL process produces would be more enduring than recriminations on the IMC, the effort to improve the setting of ZEBRA would be a continuing one.

K. The most important aspect of the Navy's TQL program is support from the top. I am on board and ready to lead the team effort. However, we need to recognize that this will be a long-term undertaking which will take years to implement fully. I want to start now.

L. Become familiar with the total quality management approach by reading one or more current books on the subject which may be found in all libraries and book stores. I am convinced that our emphasis on quality is the right course for the Navy as we sail into perhaps the most challenging sea we have yet encountered.

M. The CNO'S Fourteen Points of TQL

1. Understand the mission and principles of the Navy. Have a clear grasp of how your command supports the Navy's mission and how the principles apply to your day-to-day actions.
2. Quality is the essence of TQL. Insist on quality performance and material. Do the work correctly the first time.
3. Know your duties. Analyze and understand every facet of your

responsibilities and those of your sailors.

4. Words alone don't solve problems. Look first at the process and the system for faults and solutions, not the people. Improve the process, train the sailors.
5. Quality training is the key to success. Sailors must be fully trained to do their work. You are never too senior to learn.
6. Use analytical methods to understand and improve your work. Graphs and charts, properly used, are invaluable tools in this effort.
7. We are a team. We must work together across departments and commands. We must listen to the most junior sailor. All suggestions for improvement must be explained and action taken or rejected by leadership. The leadership will not necessarily adopt all ideas but the leadership must provide the feedback on every suggestion.
8. Create an atmosphere of trust and open communication where everyone shares a sense of pride in their work. Get fear out of the work place. Create an atmosphere in which sailors tell you what is wrong so that it may be fixed. Unless we recognize the problems we cannot improve.
9. Inspect smarter. Inspections should be methods of learning and improvement rather than threatening events. As all learn to do the work correctly the first and every time, the number of inspections will decrease.
10. Demand quality, not quotas. If we get quality, all the other goals and quotas will follow.
11. Education and self-improvement are just as important as training. We must always get better.
12. All improvements, big and small alike, are important.
13. Be a leader. Your duty as a supervisor is to guide and assist your sailors. The leader gets his sailors the tools and training they need to do their work correctly. Leaders must insure sailors are properly trained before they stand a watch, start a pump, light off a radar, fire a gun, load a missile, etc.

14. All hands, from seaman to admiral must learn to use TQL.

9103 **GUIDING PRINCIPLES FOR THE DON SUPPORT ESTABLISHMENT.** The purpose of the DoN support establishment is to provide our Sailors and Marines with the ability to go anywhere, anytime, to successfully defend the nation's interests and survive. In achieving this purpose, the following principles will guide our decisions and actions:

We will accomplish the mission.

We recognize the central fact that our Sailors and Marines are the best prepared and that our units have the highest rates of operational readiness in our history. They are at the heart of our ability to perform the mission. We must maintain that quality.

We are all responsible for accomplishing the mission. That is our first loyalty. We must strive to find new ways to cooperate within the DON which look beyond a single service warfare community or traditional role and responsibility. Pride, professionalism and a sense of community are extremely important but we must ensure that they are not rigid barriers to our interoperability. The valuable process of competing for resources and roles must not be carried to divisive and destructive extremes.

We accept responsibility for taking control of and improving all the systems and processes through which we support Sailors and Marines. We can ensure that the weapons, ammunition, training, transport, health care, housing and all other goods and services which constitute that support are of predictable high quality and available on time and in sufficient quantity for any task they may be called upon to perform.

We must use innovation to meet current and future requirements and challenge ourselves to develop creative methods, including new technologies, to enhance our support to our operating forces.

We are committed to honesty and integrity, recognizing that the public trust and defense of the nation requires the highest standards of moral conduct. By integrity we mean that we will make decisions which are in the best interests of the Navy, the Marine Corps and the nation without regard to personal consequences.

We have adopted the term "Total Quality Leadership (TQL)" as the general term under which we will pursue total quality efforts. However, we understand that it is the concepts and content of those efforts that is important; not what they are called.

9104 **A VISION FOR THE DON SUPPORT ESTABLISHMENT IN THE YEAR 2000.** The fully integrated Navy-Marine Corps team remains the world's premier force to carry out the national will in increasingly hostile global maritime environment. It deploys a high quality, multi-purpose, flexible force designed to meet a variety of the most likely contingencies.

In order to respond to the volatile and unpredictable nature of the world-wide threat, our forces must provide deterrence through presence and an ability to project power quickly.

The combined force is sustained in this mission by a support establishment which has dramatically decreased the time necessary to field new weapons systems, alter training cycles, accomplish overhauls, etc.

These and other supporting services, including medical care, are of a uniformly high quality because our leadership accepts responsibility for continuously improving all the systems and processes which govern our support establishment.

The support establishment consists of:

Leaders prepared to exercise their responsibilities with quality as the principal focus.

Properly prepared to exercise their responsibilities with quality as the principal focus.

Acknowledged experts in the technologies key to maritime operations.

Acquisition and maintenance strategies which will strengthen the public/private relationships to produce quality products and services faster and at competitive prices.

Well-trained professionals dedicated to excellence with confidence and pride in their Navy and Marine Corps.

CHAPTER 92

ETHICS FOR SJAs

9201 REFERENCES

- A. JAGINST 5803.1 of 26 October 1987
- B. American Bar Association Model Code of Professional Responsibility (1980).
- C. American Bar Association Model Rules of Professional Conduct (1984).
- D. American Bar Association Standards for Criminal Justice (1986).
- E. ABA/BNA Lawyers' Manual of Professional Conduct (1988).
- F. The Legislative History of the Model Rules of Professional Conduct, ABA (1987).
- G. The Annotated Model Rules of Professional Conduct, ABA (1986).

9202 **INTRODUCTION.** In August of 1983, the House of Delegates of the American Bar Association adopted the ABA Model Rules of Professional Conduct. The ABA hopes these rules will replace the Model Code of Professional Responsibility which had been adopted, with minor revisions, by virtually every state. The legislatures, bar associations, and appellate courts of the states are now in the process of reviewing and evaluating the new Model Rules of Professional Conduct. Although several states have adopted the Model Rules, it appears that every state doing so is making major changes in a variety of areas. Accordingly, we face state ethical codes that differ widely from jurisdiction to jurisdiction. Additionally, the Judge Advocate General of the Navy has adopted a variation of the ABA Model Rules for judge advocates. SJAs must familiarize themselves with the various ethical codes relevant to their practice.

9203 **SCOPE.** The Rules of Professional Conduct (RPCs), promulgated as enclosure (1) to JAGINST 5803.1, provide a benchmark standard of lawyer conduct for DoN attorneys. While the RPCs provide a basis for taking action should a lawyer fail to comply or meet the standards, they do not provide a basis for a civil cause of action against either DoN or the individual judge advocate.

A. Application. The RPCs apply to all:

1. Navy and Marine Corps judge advocates;
2. Civilian attorneys who are DoN employees and work under the authority of the Judge Advocate General (JAG); and
3. Civilian attorneys representing servicemembers in any matter within JAG's cognizance.

B. Other Potential Sources of Ethical Rules.

1. ABA Standards for Criminal Justice apply to military judges, counsel, and clerical support personnel of DoN courts-martial.
2. Ethics code where licensed to practice law. "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere." (ABA Model Rule 8.5.)
3. Ethics code in the jurisdiction of current practice.

9204 **CONFLICT RULES.** The practice of judge advocates can present many scenarios in which the attorney faces conflicting professional duties. Consider, for example, a Navy judge advocate joins the Navy after passing the New Jersey bar and is assigned at NLSO Jacksonville for duty as a legal assistance officer. His first client, a dependent spouse, reveals her plans to commit a crime in town: buy drugs. The judge advocate is bound by the New Jersey rules to remain silent yet bound to disclose under the Florida rules.

A. Resolving Conflicts. Where possible, judge advocates should follow the most restrictive standard, i.e., if a course of conduct is permitted under one standard and mandatory under another standard, follow the mandatory standard. The attorney should also consider practical alternatives. In some cases, finding the client new counsel may eliminate the issue. In other cases, seeking an exception from the state bar may be appropriate.

B. Unresolvable Conflicts. Paragraph 5 of JAGINST 5803.1 specifically provides that the Rules of Professional Conduct contained therein take precedence over any such rules promulgated by any other jurisdiction.

1. In Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984), the Supreme Court held that FCC regulations preempted the field of "pay cable" programming regulations indicating that, "Federal regulations have no less preemptive effect than Federal statutes." 467 U.S. at 699. Accordingly, the judge

advocate facing conflicting ethical rules can probably most safely elect to follow the Federal regulation on point and argue that the Federal regulations preempt any conflicting state laws or regulations.

2. Under the comment to ABA Model Rule 8.5, the general authority of states to regulate must be reconciled with the authority of federal tribunals to regulate practice. If conflict is unavoidable, follow the Navy Rule. DoN has the most significant contacts with the ethical issue. If the state bar brings proceedings, seek removal to Federal court. Kolibash v. Committee on Legal Ethics of the West Virginia Bar, 872 F.2d 571 (4th Cir. 1989).

9205

DUTIES OF SUPERVISORS AND SUBORDINATES

A. SJAs Must Ensure Subordinates Comply. Under RPC 5.1, supervisory judge advocates shall make reasonable efforts to ensure that all judge advocates conform to the RPCs. An SJA having direct supervisory authority over another judge advocate shall make reasonable efforts to ensure that the other judge advocate conforms to the RPCs. This SJA responsibility extends to nonlawyers under supervision, e.g., summer law students on TEMAC/TAD under RPC 5.3. SJAs should provide instruction as necessary to ensure their subordinates understand their professional responsibilities. Similarly, an SJA is responsible for ensuring that subordinate judge advocates are properly trained and competent to perform their assigned duties.

B. Responsibility for Acts of a Subordinate. An SJA assumes imputed responsibility for acts of subordinates if the SJA, as supervisory judge advocate:

1. Orders or, with knowledge of the specific conduct, ratifies the conduct involved; or,
2. has direct supervisory authority over the other judge advocate and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

C. Subordinates Are Bound by the RPCs. Under RPC 5.2, all judge advocates are bound by the RPCs, even if acting at the direction of another person. A subordinate may rely on ethical judgment of a supervisor if the issue is reasonably subject to question. If the ethical question can be answered only one way, the subordinate must comply with the RPCs, even if the supervisor directs a contrary course. When representing individual clients, subordinates are required to exercise unfettered loyalty and professional independence as may be required by that particular assignment. RPC 5.4a.

9206

PROFESSIONAL RESPONSIBILITY COMPLAINTS

A. Professional Misconduct. Professional misconduct includes any act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Acts of professional misconduct listed under RPC 8.4 include conduct involving deceit, dishonesty, fraud, breach of trust, or conduct prejudicial to the administration of justice.

B. Reporting Requirements. A lawyer with knowledge of a violation of a Rule of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness, must report the violation. RPC 8.3. This RPC does not require disclosure of information protected under the attorney-client privilege under RPC 1.6.

C. Procedure for Resolving Complaints Against DoN Judge Advocates

1. The complaint shall be in writing and signed by the complainant. The complaint must specify the nature and grounds for the alleged mental, physical, or ethical disqualification which renders that judge advocate unfit to discharge their duties. The complaint is forwarded to the appropriate Ethics/Legal Professional Disciplinary Authority (E/LPDA).

2. The E/LPDA is the judge advocate authorized to discipline judge advocates under JAGINST 5803.1 for violation of the RPCs. Except for suspension of certification and decertification under Article 27(b), UCMJ, which are reserved to JAG, discipline may be imposed on a judge advocate (except military judges, and Marine Corps defense counsel) by the SJA or senior judge advocate of the command to which the respondent judge advocate is attached or assigned when the questioned conduct occurred.

3. The complaint is then considered by the respondent's commander.

- a. The commander may dismiss the complaint if unfounded. The commander endorses and returns the complaint to the complainer. Disposition is reported to AJAG (Civil Law), via SJA to CMC if appropriate.
- b. The commander may refer the complaint to the E/LPDA for further inquiry or comments or recommendations regarding disposition.

- c. The commander may designate a judge advocate senior in rank to the respondent to investigate the allegations of the complaint to determine whether further action is warranted.
- d. At the conclusion of any investigation, the commander may authorize the E/LPDA to take appropriate remedial action, e.g., warning, counseling, additional professional instruction, punitive or administrative action;
- e. If suspension or decertification are necessary, the commander may direct the E/LPDA to forward the original complaint, a written report of any investigation, all other relevant information, and his comments and recommendations to the officer in the chair of command exercising general court-martial jurisdiction (GCMA)(except where the commander possesses such authority).

4. Consideration by the GCMA. The GCMA may take any action as specified above for the immediate commander. If the GCMA deems that remedial measures short of suspension or decertification are inadequate, a board of officers will be appointed to investigate the matter and to report its findings and recommendations. (See chapter 82 of this Deskbook). The respondent is entitled to 10 days' notice and generally to the rights of a "party" at the hearing, with the exception of the right to IMC. (See chapter 61 of this Deskbook).

5. Forwarding to JAG The Board's report is forwarded to the GCMA. A copy is given to the respondent when and if the GCMA approves it. If approved with a recommendation for suspension or decertification, the report, is forwarded to JAG together with all allied papers and any respondent comment on the report. When no action is recommended, a letter report of the facts and circumstances will be forwarded to JAG by the E/LPDA assigned to the officer who convened the board.

9207

SELECTED ETHICS ISSUES

A. The Department of the Navy As The Client. Per paragraph 4.a of JAGINST 5803.1, the Department of the Navy (or the United States Navy or Marine Corps) is the client served by each judge advocate certified by JAG under article 27(b), UCMJ, unless assigned another client by competent authority.

1. Nature of the Privilege. The attorney-client privilege exists between the judge advocate and DoN as represented by the commander or head of the organization, e.g., commanders of corps, fleets, divisions, ships and other heads of

activities.

- a. The privilege extends to matters within the scope of the official business of the organization.
- b. The head of the organization cannot invoke the attorney-client privilege for his own benefit.

2. Client Control. If the commander engages in activity or intends to act or refuses to act in some manner that violates his legal obligation or the law, the SJA may:

- a. Ask the official to reconsider.
- b. Advise that a separate legal opinion be sought.
- c. Refer the matter to or seek guidance from higher JAG authority.
- d. Advise official that his personal legal interests are at risk and he should consult counsel.
- e. If, despite the judge advocate's efforts, the highest authority that can act concerning the matter insists upon action or refuses to act, in clear violation of law, the judge advocate may terminate representation with respect to the matter in question; in no event shall the lawyer participate or assist in the illegal activity.

B. Confidentiality

1. General rule. Under RCP 1.6, a lawyer shall not reveal any information relating to the representation of a client. This applies to information obtained prior to formation of attorney-client relationship.

2. Exceptions to confidentiality.

a. Permissive. A client may consent to disclosure of confidences under RCP 1.6. Judge advocates have implied authority to make disclosures to the extent necessary to represent the client effectively. Disclosure is also permitted to establish a claim or defense in a controversy with a client.

b. Mandatory. Under RCP 1.6(b), judge advocates must disclose information they reasonably believe necessary to prevent a client from committing a crime which is likely to result in imminent death or substantial bodily harm. Similarly, the rule requires a judge advocate to disclose information that he

reasonably believes is necessary to prevent a client from committing a crime which will impair the readiness or capability of a military unit, vessel, aircraft, or weapon system.

c. Past and Other Offenses. No authority exists for revealing information of other potential offenses or past offenses under the RCPs.

C. Client Perjury

1. ABA position. Per ABA Formal Opinion 87-353 (1987), a lawyer who knows that his client intends to testify falsely must:

- a. First: advise the client not to do so and explain the consequences of doing so, including the lawyer's duty to disclose.
- b. Second: attempt to withdraw (if the lawyer's efforts to dissuade the client from testifying falsely are unsuccessful).
- c. Third: limit examination to truthful areas or do not permit the client to testify at all.
- d. Fourth: if not possible, disclose to the tribunal the client's intention to commit perjury.
- e. Fifth: if perjury has already been committed, persuade the client to rectify it.
- f. Sixth: disclose the perjury if unsuccessful.

2. Navy Position. Under RCM 3.3a(4), a judge advocate may not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. Similarly, a judge advocate may not knowingly offer evidence he knows to be false. If a judge advocate has offered material evidence and later learns it to be false, the judge advocate shall take reasonable remedial measures. A lawyer may also refuse to offer evidence that the lawyer reasonably believes is false RCP 3.3c.

D. Threatening Criminal Prosecution. It is unethical for an attorney to threaten criminal prosecution to gain an advantage in a civil matter. A correct statement of fact that includes the possibility of criminal action if a civil obligation is not fulfilled, even if such statement may be construed as a threat, by itself is not an ethical violation. The motivation and intent of the attorney involved will be a factor in determining whether his or her actions were ethically improper. The means employed by the attorney may not have a substantial purpose to embarrass, delay,

or burden the recipient of the communication. Legal assistance attorneys must be vigilant to avoid intemperate language in correspondence regarding delinquent support obligations, etc. SJAs should monitor the letters of legal assistance officers on behalf of their clients. They, and other supervisors, have an ethical obligation to see that the RPCs are obeyed.

9208 **STATE MODEL RULES.** The following is a list of jurisdictions that have adopted new legal ethics rules since the ABA approved the Model Rules of Professional Conduct in August 1983.

Alabama:	Model Rules as amended; January 1, 1991.
Arizona:	Model Rules as amended; February 1, 1985.
Arkansas:	Model Rules as amended; January 1, 1986.
California:	Takes structure and substance from both Model Rules and Model Code; May 27, 1989.
Connecticut:	Model Rules as amended; October 1, 1986.
Delaware:	Model Rules as amended; October 1, 1985.
District of Col:	Model Rules as amended; January 1, 1991.
Florida:	Model Rules as amended; January 1, 1987.
Idaho:	Model Rules as amended; November 1, 1986.
Illinois:	Structure of Model Rules, with substance from both Model Rules and Model Code; August 1, 1990.
Indiana:	Model Rules as amended; January 1, 1987.
Kansas:	Model Rules as amended; March 1, 1988.
Kentucky:	Model Rules as amended; January 1, 1990.
Louisiana:	Model Rules as amended; January 1, 1987.
Maryland:	Model Rules as amended; January 1, 1987.
Michigan:	Model Rules as amended; October 1, 1988.
Minnesota:	Model Rules as amended; September 1, 1985.
Mississippi:	Model Rules as amended; July 1, 1987.
Missouri:	Model Rules as amended; January 1, 1986.
Montana:	Model Rules as amended; July 1, 1985.
Nevada:	Model Rules as amended; March 28, 1986.
New Hampshire:	Model Rules as amended; February 1, 1986.
New Jersey:	Model Rules as amended; September 10, 1985.
New Mexico:	Model Rules as amended; January 1, 1987.
New York:	Amended Model Code incorporating substance of some Model Rules; 1 September 1990.
North Carolina:	Takes structure and substance from both Model Rules and Model Code; October 7, 1985.
North Dakota:	Model Rules as amended; January 1, 1988.
Oklahoma:	Model Rules as amended; July 1 1988.
Oregon:	Amended Model Code incorporating substance of some Model Rules; June 1, 1986.
Pennsylvania:	Model Rules as amended; April 1, 1988.
Rhode Island:	Model Rules as amended, 15 November 1988.

South Carolina:	Model Rules as amended; September 1, 1990.
South Dakota:	Model Rules as amended; July 1, 1988.
Texas:	Model Rules as amended; January 1, 1990.
Utah:	Model Rules as amended; January 1, 1988.
Virginia:	Amended Model Code incorporating substance of some Model Rules; October 1, 1983.
Washington:	Model Rules as amended; September 1, 1985.
West Virginia:	Model Rules as amended; January 1, 1989.
Wisconsin:	Model Rules as amended; January 1, 1988.
Wyoming:	Model Rules as amended; January 12, 1987.

9209 MANDATORY CONTINUING LEGAL EDUCATION.

Thirty-six states have a mandatory continuing legal education (CLE) requirement.

Judge advocates licensed in these states must attend approved CLE programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance or reason for exemption from compliance. Responsibility for maintaining good standing with the bar rests with the individual judge advocate. To enable SJAs to assist their judge advocates in their compliance efforts, the following list loosely summarizes state requirements. This information is not intended as a substitute for liaison with bar officials; state bar membership requirements change too rapidly to permit use of this list as an exclusive reference. For information on state approval of CLE credit for NJS courses, contact LCDR H. B. Thompson, JAGC, USN at AV 948-3800.

Alabama: MCLE Commission, Alabama State Bar, 415 Dexter Ave., Montgomery, AL 36104 (205-269-1515) (12 hours per year; Active duty military attorneys are exempt but must declare exemption; Reporting date, 31 December)

Arizona: Director, Programs and Public Services Division, 363 North First Ave., Phoenix, AZ 85003 (602-252-4804) (15 hours each year including 2 hours professional responsibility; Reporting date: 15 July)

Arkansas: Director of Professional Programs, 1501 N. University #311 Little Rock, AR 72207 (501-664-8737) (12 hours per year; Reporting date: 30 June)

Colorado: CLE, Dominion Plaza Building, 600 17th St. Suite 520-S, Denver, CO 80202 (303-893-8094) (45 hours, including 2 hours of legal ethics during 3-year period; Newly admitted attorneys must also complete 15 hours in basic legal and trial skills within 3-years; Reporting date: Anytime within 3-year period)

California: State Bar of California, 100 Van Ness, 28th Floor, San Francisco, CA 94102 (415-241-2100) (36 hours every 36 months. Eight hours must be on legal ethics and/or law practice management, with at least 4 hours in legal ethics, 1 hour of substance abuse and emotional distress, and 1 hour on the elimination of bias; Attorneys employed by the Federal Government are exempt; Reporting date: Effective 1 February 1992. Credits earned from 1 September 1991 may be carried forward to the initial compliance period.)

Delaware: Commission on CLE, 831 Tatnall Street, Wilmington, DE 19801 (302-658-5856) (30 hours during 2-year period; Reporting date: 31 July)

Florida: Director, Legal Specialization & Education, The Florida Bar, 650

- Apalachee Parkway, Tallahassee, FL 32399-2300 (904-561-5690) (30 hours during 3-year period, including 2 hours of legal ethics; Active duty military are exempt but must declare exemption during reporting period; Reporting date: Assigned month every 3 years)
- Georgia: Georgia Commission on Continuing Lawyer Competency, 800 The Hurt Building, 50 Hurt Plaza, Atlanta, GA 30303 (404-527-8710) (12 hours per year, including 1 hour legal ethics, 1 hour professionalism and 3 hours trial practice (trial attorneys only); Reporting date: 31 January)
- Idaho: Deputy Director, Idaho State Bar, P.O. Box 895, Boise, ID 83701-0898 (208-342-8959) (30 hours during 3-year period; Reporting date: Every third year depending on year of admission)
- Indiana: Indiana Commission for CLE, 101 West Ohio, Suite 410 Indianapolis, IN 46204 (317-232-1943) (36 hours within a 3-year period (minimum 6 hours per year); New admittees by examination are given 3-year grace period beginning 1/1 before admission; Reporting date: 31 December)
- Iowa: Executive Director Commission on CLE, State Capitol, Des Moines, IA 50319 (515-281-3718) (15 hours each year, including 2 hours of legal ethics during 2-year period; Reporting date: 1 March)
- Kansas: CLE Commission, Kansas Judicial Center, 301 West 10th Street, Room 23-S, Topeka, KS 66612-1507 (913-357-6510) (12 hours each year; Reporting date: 1 July)
- Kentucky: CLE, Kentucky Bar Association, W. Main at Kentucky River, Frankfort, KY 40601 (502-564-3795) (15 hours per year, including 2 hours of legal ethics; Bridge the Gap Training for new attorneys; Reporting date: June 30.)
- Louisiana: CLE Coordinator, Louisiana State Bar Association, 601 St. Charles Ave., New Orleans, LA 70130 (504-566-1600) (15 hours per year, including 1 hour of legal ethics; Active duty military are exempt but must declare exemption; Reporting date: 31 January)
- Michigan: Executive Director, State Bar of Michigan, 306 Townsend St., Lansing, MI 48933 (517-372-9030) (30 or 36 hours (depending on whether admitted in first or second half of fiscal year) within 3 years of becoming active member of bar. Six or 12 hours the first year, 12 hours second year and 12 hours third year. Courses must be taken in sequence identified by CLE Commission. Reporting date: 31 March)
- Minnesota: Director, Minnesota State Board of CLE, 1 West Water St., Suite 250,

St. Paul, MN 55107 (612-297-1800) (45 hours during 3-year period; Reporting date: 30 August)

Mississippi: CLE Administrator, Mississippi Commission on CLE, P.O. Box 2168, Jackson, MS 39225-2168 (601-948-4471) (12 hours per year; Active duty military attorneys are exempt, but must declare exemption; Reporting date: 31 December. (In the process of changing to 1 August))

Missouri: Director of Programs, P.O. Box 119, Jefferson City, MO 65102 (314-635-4128) (15 hours per year, including 3 hours legal ethics every 3 years; New admittees 3 hours professionalism, legal/judicial ethics, or malpractice in 12 months; Reporting date: 31 July.

Montana: MCLE Administrator, Montana Board of CLE, P.O. Box 577, Helena, MT 59624 (406-442-7660) (15 hours per year; Reporting date: 1 March)

Nevada: Executive Director, Board of CLE, 295 Holcomb Avenue, Suite 5-A, Reno, NV 89502 (702-329-4443) (10 hours per year; Reporting date: 1 March)

New Mexico: MCLE Administrator, P.O. Box 25883, Albuquerque, NM 87125 (505-842-6132) (15 hours per year, including 1 hour of legal ethics; Reporting date: 30 days after program)

North Carolina:

Executive Director, The North Carolina State Bar, 208 Fayetteville Street Mall, P.O. Box 25148, Raleigh, NC 27611 (919-733-0123) (12 hours per year including 2 hours of legal ethics; Special 3-hour block of ethics once every 3 years; New attorneys 9 hours practical skills each of first 3 years of practice; Armed Service members on full-time active duty exempt, but must declare exemption; Reporting date: 28 February of succeeding year)

North Dakota:

North Dakota CLE Commission, P.O. Box 2136, Bismark, ND 58502 (701-255-1401) (45 hours during 3-year period; Reporting date: period ends 6/30; affidavit must be received by 7/31)

Ohio:

Secretary of the Supreme Court, Commission on CLE, 30 East Broad Street, Second Floor, Columbus, OH 43266-0419 (614-611-5470) (24 hours during 2-year the period, including 2 hours of legal ethics or professional responsibility every cycle, including instruction on substance abuse; Active duty military are exempt, but pay a filing fee; Reporting date: every 2 years by 31 January)

- Oklahoma: MCLE Administrator, Oklahoma State Bar, P.O. Box 53036, Oklahoma City, OK 73152 (405-524-2365) (12 hours per year, including 1 hour of legal ethics; Active duty military are exempt, but must declare exemption; Reporting date: 15 February)
- Oregon: MCLE Administrator, Oregon State Bar, 5200 SW., Meadows Road, P.O. Box 1689, Lake Oswego, OR 97034-0889 (503-620-0222-ext. 368) (45 hours during 3-year period, including 6 hours of legal ethics; New admittees--15 hours, 10 must be in practical skills and 2 in ethics; Reporting date: Initially birthday; thereafter all reporting periods end every 3 years except new admittees and reinstated members--an initial 1-year period)
- South Carolina:
Administrative Director, Commission on CLE, Continuing Lawyer Competence, P.O. Box 2138, Columbia, SC 29202 (803-799-5578) (12 hours per year, including 6 hours ethics/professional responsibility every 3 years in addition to annual MCLE requirement; Active duty military attorneys are exempt, but must declare exemption; Reporting date: 15 January)
- Tennessee: Executive Director, Commission on CLE, 214 2nd Ave., Suite 104, Nashville, TN 37201 (615-242-6442) (12 hours per year; Active duty military attorneys are exempt; Reporting date: 1 March)
- Texas: Director of MCLE, Texas State Bar, Box 12487, Capital Station, Austin, TX 78711 (512-463-1442) (15 hours per year, including 1 hour of legal ethics; Reporting date: Last day of birthmonth yearly)
- Utah: MCLE Administrator, 645 S. 200, E. Salt Lake City, UT 84111-3834 (801-531-9077; 800-662-9054) (24 hours during 2-year period, plus 3 hours of legal ethics; Reporting date: End of 2-year period)
- Vermont: Director, MCLE, Pavilion Office Building, Montpelier, VT 05602 (802-828-3281) (20 hours during 2-year period, including 2 hours of legal ethics; Reporting date: 15 July)
- Virginia: Director of MCLE, Virginia State Bar, 801 East Main Street, 10th Floor, Richmond, VA 23219 (804-786-5973) (8 hours per year; Reporting date : 30 June (annual license renewal))
- Washington:
Executive Secretary, Washington State Board of CLE, 500 Westin Building, 2001 6th Ave., Seattle, WA 98121-2599 (206-448-0433) (15 hours per year; Reporting date: 31 January (May for supplementals with

late filing fee; \$50 1st year; \$150 2nd year; \$250 3rd year, etc.))

West Virginia:

MCLE Coordinator, West Virginia State Bar, State Capitol, Charleston, WV 25305 (304-348-2456) (24 hours every 2 years, at least 3 hours must be in legal ethics or office management; Reporting date: 30 June)

Wisconsin:

Director, Board of Attorneys Professional Competence, 119 Martin Luther King, Jr. Boulevard, Room 405, Madison, WI 53703-3355 (608-266-9760) (30 hours during 2-year period; Reporting date: 20 January every other year)

Wyoming: Wyoming State Bar, P.O. Box 109, Cheyenne, WY 82003-0109 (307-632-9061) (15 hours per year; Reporting date: 30 January)

CHAPTER 93

AN NJS PROGRAM FOR EFFECTIVE WRITING

9301 INTRODUCTION

"Words are the dress of thoughts which should no more be presented in ragged tatters than your person should."

Lord Chesterfield.

Mastery of self-expression is one difference between the competent and the exceptional. All things being equal, the officer who has expended the effort to master the skills of writing and speaking will rise more rapidly, be a more effective leader, and contribute more to the military service and the nation. SJAs are often called in on a problem precisely because of their reputation for superior written expression.

In recorded military history, mastery of communication has been a mark of the successful military officer. Ability to impart information in a clear, concise manner is a blessing for both superiors and subordinates. Superiors, already overburdened with a mass of sometimes conflicting information, welcome the discovery of an officer who can present an oral or written case that is logical, brief, and to the point. That officer will always be able to get a hearing.

For the subordinate who needs either directions or information, it is an equal blessing to find a superior who can provide clear information in an understandable manner. Most people neither need nor want long, detailed expositions of grand strategy. They simply want to know what they are supposed to do now.

How does one become a good writer? Anyone who has the brains to gain a commission has the brains to become a good writer. It requires work. It doesn't come easily or quickly. It demands time and effort to master the language. It demands practice, practice, and more practice. Lastly, the writer must have something to say. The task is to deliver the message of substance in the clearest possible way. Almost always, this means the shortest way.

Extensive practice creates the ability to look at a problem, define its important parts, and discover the possible solutions. Before one can write, one has to think. What an officer thinks will be reflected in the structure, the choice of words, and the logic of the writing. This does not mean that the task will ever become easy. Good writing always will require more perspiration than inspiration. The following lessons provide a means to examine one's own writing and for enhancing the writing skills of our subordinates. The program is broken into eight lessons for, as Rousseau tells us: "However great a man's natural talent may be, the art of writing can not be

learned all at once."

9302

LESSON ONE

QUOTE FOR THE WEEK

"There are three rules for good writing. Unfortunately, no one knows what they are."

W. Somerset Maugham

CO's CORNER

Test your writing:

- Does it convince (vice confuse)?
- Is it clear on the first quick reading?
- Does it get to the point quickly?
- Does it tell the decisionmaker exactly what action to take?
- Does it provide an efficient means for the decisionmaker to effect your recommendation?

LESSON

The only way to become a writer is to write. There are reasons why the services are so free with dictionaries and run so many courses on fundamental writing skills. There are reasons why the services have either published or adopted a manual for style and format. The services want to provide opportunities for mastery of the language. Just as a condition of the profession demands that an officer master a particular weapon, learning the language of the profession is similarly essential. Poor spelling, poor grammar, and lack of specific vocabulary are excuses, not the result of effort. Even great athletes, whose stock in trade is essentially muscular coordination, understand the need for practice.

Poor writing, in one respect, is similar to pornography - you know it when you see it. As members of the legal profession, we are not exempt from the many pitfalls of poor writing. Our subject matter, however, does not mandate incomprehensible communication.

For an example of good writing, travel back in time to your first-year torts class.

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound to another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact, it contained fireworks, but there was nothing in its appearance to give notice of its content. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.

What's so good about this passage?

It contains 181 words and 12 sentences.

The average sentence length is approximately 15 words.

The subject is separated from the verb by other words in only five sentences.

Only two of the verbs are in the passive voice.

Notice the economy of words. Cardozo does not say "despite the fact that the train was already moving." He says "though the train was already moving."

In future segments, we will explore these aspects of good writing in greater detail.

STYLE THOUGHTS

Formal education is not a prerequisite for writing ability and having something to say. What is required is an interest in development of the skills and of the surrounding world. A few simple rules are helpful:

--The more simply a thing is said, the more powerfully it influences those who read it.

--There is always one best word to convey a thought or feeling. The use of a weaker substitute will deprive the writing of force and impact.

--Economy of words strengthens the writing.

An outline is imperative. It may exist only in the mind of the writer, but it must exist. Each piece of writing must have three things: a beginning, a middle, and an end. Writing is similar to a journey. The destination--the conclusion--must be known before the effort is begun.

RULES OF ENGAGEMENT

Rules for Citation. In military correspondence, memoranda, briefs, etc., judge advocates adhere to a set of fixed rules for consistent citation of authorities.

References. A Uniform System of Citation (14th ed. 1986)[hereinafter USOC] is the primary reference for legal citation. When a rule for a particular citation cannot be found in USOC, consult the United States Government Printing Office Style Manual (rev. ed. 1984). For correspondence preparation generally, consult SECNAVINST 5216.5 (Series), Subj: Department of the Navy Correspondence Manual.

Placement of Citations. Citations may either follow sentences or be placed in the middle of sentences. If a citation follows a sentence, neither brackets nor parentheses are required to isolate the citation. A signal which begins a new "sentence" of citation should be capitalized. A citation which is inserted within a sentence should be set off by parentheses or, if there are parentheses within the citation, by brackets. If parentheses are used, and stand within a construction that would be followed by a comma, the comma should be placed after the parenthesis. For cites within brackets or parentheses within sentences, initial signals are not capitalized, and there is no ending punctuation unless the cite concludes the sentence, in which instance a period should follow the last parenthesis.

Dates. In correspondence addressed to military personnel or departments, use the military form, e.g., 12 September 1990. In citations, when citing military cases and directives, letters, and other references not specifically covered in the GPO Style Manual, use the military form but abbreviate the month, e.g., 12 Sept. 1977. (By the way, September is the only month with a four-letter abbreviation.) Correspondence to nonmilitary addressees should use standard dates, e.g. September 12, 1990.

9303

LESSON TWO

QUOTE FOR THE WEEK

"There's nothing to writing. All you do is sit down at a typewriter and open a vein."

Red Smith

CO's CORNER

Make your organization obvious! Consider the use of topics or headings to organize your paper, even if it is very short. They make your organization more apparent to the reader than do lengthy sections under a single heading.

LESSON

Substance is essential to military writing. In the world of the arts, it is frequently in vogue to praise style and ignore substance. This is unacceptable in writing for the Armed Forces. There is a wealth of literature about the world's Armed Forces. Because of the diversity of the services and the specific interests of the officer corps, however, it is imperative that

... military literature be just the foundation of the interests of the individual officer. Every officer should develop a core library of classics that will guide thought and serve as a reference. The purpose of this library is to see what the writer saw, to develop the ability to agree or disagree with the writer, and--most importantly--to add to the ability to think, to observe, and to write.

A paragraph, as described by Mr. Webster, is a "distinct division of a written work or composition that expresses some thought or point relevant to the whole but is complete in itself and may consist of a single sentence or several sentences."

The reader is informed of the thought to be conveyed in the paragraph by use of one or more topic sentences. A topic sentence is a general statement, followed or supported in the rest of the paragraph by proof.

When positioned as the first sentence in the paragraph, the topic sentence sets the stage, to be followed by the appropriate support. A topic sentence as the final sentence can create a sense of interest or tension, a lead-up to the final conclusion. A variation on the theme is a unique use of topic sentences to create the "ole one-two punch."

From the beginning of the juvenile court system, wide differences have been tolerated--indeed insisted upon--between the procedural rights of adults and those of juveniles. In practically all states, rights granted to adults are

withheld from juveniles. In addition to the specific problems involved in the present case, for example, courts have held that the juvenile is not entitled to bail, to indictment by grand jury, to a public trial, or to trial by jury. It is frequent practice that rules governing the arrest and interrogation of adults by the police are not observed in the case of juveniles.

The paragraph above demonstrates topic sentences at the beginning, followed by specific supporting examples.

The juvenile court judge is in a better position to evaluate the character of young offenders. The juvenile court judge also has an advantage in assessing the juvenile court's ability to deal with offenders of that character. Day-to-day exposure to the successes and failures of juvenile dispositions gives the juvenile court judge a thorough understanding of the various available dispositional alternatives, an understanding that far surpasses that of any criminal court judge. For these reasons, the juvenile court judges emerge as the best possible transfer decisionmaker--and as the choice of the American Bar Association.

The paragraph above demonstrates the "ole one-two punch." Note that the juvenile court judge advances from being in the "better position" to become "the best possible" decisionmaker.

STYLE THOUGHTS

Suspect wordiness in everything you write. Quarrel with the need for every paragraph, every sentence, every word. The longer you take to say things, the more you blur your ideas. When deadlines permit, let your writing rest for a day and then rewrite it. And rewrite it.

Vague terminology and phrases are twice cursed: first, by the writer who lacked the precision to say what was meant, and second, by the reader who must waste time and effort trying to determine what the writer meant to say. It is easy to fall back on service jargon. This is both pretentious and a waste of time. "I did" and "we went" and the like are all in the dictionary. Use them.

Use "because" rather than "as" to indicate causality. The Robbins case is of questionable utility because [not "as"] it is only a plurality opinion. Similarly, "because" is preferred over "since" when indicating causation. "Since" is better limited to its temporal sense to avoid ambiguity.

RULES OF ENGAGEMENT

To cite courts-martial cases, judge advocates should follow the following

format:

United States Court of Military Appeals. For cases appearing in volumes 1-49, Court-Martial Reports, cite by title of the case, U.S.C.M.A. and C.M.R. volume and page number, followed by year in parentheses. E.g., United States v. Haig, 6 C.M.A. 287, 20 C.M.R. 3 (1955). For subsequent cases, cite by title of the case, Military Justice Reporter volume and page number, followed by the court and year in parentheses, e.g., United States v. Russo, 1 M.J. 45 (C.M.A. 1978).

Intermediate Military Appellate Courts. Cases appearing in volumes 1-50, Court-Martial Reports:

Navy/Marine Corps: United States v. Flynn, 39 C.M.R. 908 (NBR 1968) or United States v. Flynn, 40 C.M.R. 999 (NCMR 1968).

Army: United States v. Dalum, 39 C.M.R. 999 (ABR 1968) or United States v. Dalum, 40 C.M.R. 999 (ACMR 1968).

Air Force: United States v. Leonard, 39 C.M.R. 900 (AFBR 1968) or United States v. Leonard, 40 C.M.R. 888 (AFCMR 1968).

Coast Guard: United States v. Crowley, 39 C.M.R. 999 (CGBR 1968) or United States v. Crowley, 40 C.M.R. 999 (CGCMR 1968).

Cases decided subsequent to volume 50, Court-Martial Reports: United States v. Dronberger, 3 M.J. 501 (NMCMR 1978) or (ACMR 1978) or (AFCMR 1978) or (CGCMR 1978).

Unreported cases. In citing unreported decisions, the docket number appears following the title of the case, and the complete date is given. In the Army, Air Force, and Coast Guard, an "S" before the docket number denotes a case on the special court-martial docket. The absence of the "S" signifies a case on the general court-martial docket. E.g., United States v. Laverdiere, No. 99-876 (NCMR 31 Dec. 1979).

Records of trial: Record, p.1, CM 9999, Jones (7 Apr. 1960).

9304

LESSON THREE

QUOTE FOR THE WEEK

"The difference between the right word and the nearly right word is the same as that between lightning and the lightning bug."

Mark Twain

CO's CORNER

The goal is brevity! Brevity is always desirable. One page should be your goal. Use more than one (but never more than two) only if the fate of the nation is at stake. If more background is necessary, write a more lengthy background paper and make it an enclosure. Assume, however, that the boss won't read it unless he gets a fatal attack of intellectual curiosity or reads during head calls.

Keep your objective in sight. Before you begin to write, ask yourself: Who is the real decisionmaker here? If your advice must control, and the object is merely to convince the decisionmaker to adopt your recommendation, then advocate. If the matter is discretionary with the decisionmaker, and there is no clear answer, then identify all the pertinent considerations ("weigh and consider") and recommend.

LESSON

Paragraph Length and Transition

In the same way, good writing comes from practice and practice and more practice. Only after the process of making words into sentences and sentences into paragraphs and paragraphs into chapters becomes a natural rhythmic process does the stamp of individuality and personality shine through the writing to the reader.

- The Problem of Length

When looking at the information contained in a paragraph, several potential problems exist.

Skimming - could result from too little supporting material for the topic of the paragraph or from a topic itself that is too skimpy.

Cramming - too much support for the topic or two ideas in one paragraph.

Straying - two ideas, when the second has no connection to the first (use of parentheses or footnotes are means to correct this problem).

The one sentence wonder - although frowned upon in some circles, can be used to hammer home the information or as a transitional device.

- Transitions - Gluing the Paragraphs Together

Numerous possibilities exist to slide from one paragraph to the next.

Looking back - picking up a word or words from the last paragraph.

Looking ahead - picking up a word or words from the next paragraph.

Pausing - includes use of the one-sentence wonder paragraph

Summarizing.

Example - transition removed

State laws are generally entitled to a presumption of validity against attack under the Constitution. Legislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others, and legislative classifications are valid unless they bear no rational relationship to a permissible state objective.

A state cannot enact legislation whose purpose or effect is to create classes based upon racial criteria, since racial classifications, in a constitutional sense, are inherently suspect.

Example - transition added

State laws are generally entitled to a presumption of validity against attack under the Constitution. Legislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others, and legislative classifications are valid unless they bear no rational relationship to a permissible state objective.

Not all legislation, however, is entitled to the same presumption of validity. The presumption is not present when a state has enacted legislation whose purpose or effect is to create classes based upon racial criteria, since racial classifications, in a constitutional sense, are inherently suspect.

Consider Lincoln's Gettysburg Address from the perspective of transition:

Four score and seven years ago, our fathers brought forth on this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. We are met on a great battlefield of that war. We have come to dedicate a portion of that field, as a final

resting place for those who gave their lives that that nation might live.

The first two sentences are linked by "nation." Lincoln helps the reader jump from the second sentence to the third with "war" and from the third to the fourth with "field." These helping hands guide the reader along effortlessly. Consider the remainder of this beautiful work. (Lincoln was also mindful of brevity. By contrast, another respected official spoke for over two hours at the dedication, but no one remembers what he said.)

It is altogether fitting and proper that we should do this. But in a larger sense, we cannot dedicate, we cannot consecrate, we cannot hallow this ground. The brave men living and dead who struggled here have consecrated it far above our poor power to add or detract. The world will little note, nor long remember, what we say here, but it can never forget what they did here. It is for us, the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us--that from these honored dead, we take increased devotion to that cause for which they gave the last full measure of devotion--that we here highly resolve that these dead shall not have died in vain, that this Nation, under God, shall have a new birth of freedom--and that the government of the people, by the people, for the people, shall not perish from the earth.

STYLE THOUGHTS

Strike the redundant word. Emergencies are inherently acute; crises are grave; consideration is implicitly serious. Remove qualifying words which add little or no value, e.g., "rather" important, "somewhat" exaggerated, "pretty" vague, "very" complicated.

Avoid the use of doublings. Do not discuss a project's "importance and significance" if one modifier will do. Pairs of words with similar meanings add needless bulk to writing. Lawyers are especially prone to tautologies such as "null and void," "facts and circumstances," etc.

Avoid the use of "I think," "I feel," "we believe," and similar phrases. Let your words suggest your thoughts, feelings, and beliefs.

Avoid the use of "It is important that . . ." and similar phrases. Let the reader base any conclusion as to the importance of your point on the strength of your argument.

RULES OF ENGAGEMENT

Citations often used by the judge advocate:

Uniform Code of Military Justice. UCMJ, art. 23(a)(1), 10 U.S.C. [section symbol] 823(a)(1) (1970) or UCMJ, art. 23(a)(1)

Manual for Courts-Martial. In text, cite as Manual for Courts-Martial, 1969 (Rev.) or Manual for Courts-Martial, 1984. In footnotes, cite as MCM, 1969 (Rev.) or MCM, 1984. Citations to the appendix: MCM, 1984, app. 10. Citations to a Rule of Court-Martial: R.C.M. 123(a)(1)(A)(i)(a)(1). For Military Rules of Evidence, M.R.E. 404 is preferred over Mil. R. Evid. 404. To cite Part IV or V, use: Part IV, para. 13a(1)(a), MCM, 1984.

Articles of War. AW 65.

Department of Defense Directives:

DoD Dir. 1332.14 of 14 Jan 1989, Administrative Discharges, para. VI.A.3; DoD Inst. 5030.7 of 19 June 1987, DoD Requests for Action by Attorney General.

Navy Regulations: Navy Regs. (1990), art. 0455.1(c).

JAGINST 5800.7 (Series), Manual of the Judge Advocate General: JAGMAN [section symbol] 0101a(1).

SECNAVINST 5370.2J of 15 Apr 1989, Subj: Standards of Conduct; OPNAVINST 3574.2A, Subj: Civilian rifle and pistol marksmanship training (The period is omitted in abbreviated months in Navy instructions, letters, and messages.

Marine Corps Directives:

MCO P5215.1C, Subj: The Marine Corps Directives System; MCO 1418.1;

Marine Corps Manual: MARCORMAN, para. 10110.3a(4).

Marine Corps Personnel Manual: MARCOPERSMAN, para. 5100.3a.

Messages: USS Preble msg 131927Z Dec 88; Navy JAG Washington DC msg 131927Z Sep 90

Letters: JAG ltr JAG:131.1:CWC:dfr of 23 Sep 90 to CMC; CMC ltr of 4 Nov 89 to JAG, Subj: Women in the Navy.

Opinions: 41 Comp. Gen. 99 (1965); Ms. Comp. Gen. B-999999 (27 Apr. 1965);
40 Op. Att'y Gen. 3 (1940).

9305

LESSON FOUR

QUOTE FOR THE WEEK

"The secret of writing is never to put more on a given page than the common reader can lap off it with no strain whatsoever on his habitually slack attention."

Ezra Pound

"To write simply is as difficult as to be good."

W. Somerset Maugham

CO's CORNER

Be honest and follow the rules. If a recitation of facts is necessary, be succinct and absolutely accurate. If the facts are conflicting, or there are facts that oppose your view, acknowledge them. If a lengthy recitation is necessary, summarize in the decisional document and put the rest in an enclosure.

If someone significant opposes your recommendation, say so and state briefly why that view is wrong, e.g., "CDR Jones favors taking SN Baggue to mast. I disagree. His view is not supported by the facts because" or "The law does not support his conclusion. Manslaughter requires that"

Regarding tabulation, produce paper that looks like fast reading, e.g., "bullets," headings, indentations, tabs, short paragraphs, and double-space between paragraphs. These devices make it appear that the paper is going to cover a lot of ground in a short space. Result: the reader won't avoid reading it and will pay attention to what you are saying.

LESSON

Sentence Length and Tabulation

- Sentence Length

The key is not to include too many thoughts per sentence. For maximum comprehension, sentence length should generally average no more than 25 words.

A good example of the problems that can develop when a sentence goes on too long is the following 86-word excerpt from the California Procedure Code. In a trial by jury, the court may, when the convenience of witnesses or the ends of justice would be promoted thereby, on motion of a party, after notice and hearing, make an order, no later than the close of the pretrial conference in cases in which such pretrial conference is to be held, or, in other cases, no later than 10 days before the trial date,

that the trial of the issue of liability shall precede the trial of any other issue in the case.

With some thought, this provision could be broken down into more manageable parts. One possible "fix" is provided below.

To promote the convenience of witnesses or the ends of justice, the court in a jury trial may order the liability issue to be tried first. The order may be made on the motion of a party, after notice and a hearing. In cases where a pretrial conference is held, the order must be made before the end of the conference. In all other cases, the order must be made at least ten days before the trial date.

- Tabulation

You can present complicated material in a single sentence by:

1. Listing each element of the idea;
2. making each part of the list grammatically and generically the same;
3. indenting the list;
4. numbering the list;
5. introducing the list with a colon;
6. beginning each item on the list with a lowercase letter;
7. ending each item on the list with a semicolon;
8. placing "and" or "or" before the last item on the list; and
9. ending the list with a period.

STYLE THOUGHTS

We like to avoid repetition to maintain the reader's interest. But, in your zeal to avoid repetition and the boredom it engenders, do not cross the line and create ambiguity. It is better to repeat a word than to send an orphan antecedent in its place. Do not write "old apple," "horsehide," or "Mr. Spaulding" when you mean baseball. Better to write "banana" three times than banana, elongated yellow fruit, and monkey snack.

No two words injure naval writing more than the seemingly innocent "it is." They stretch sentences, delay your point, encourage passive verbs (see Chapter 8 for a diatribe on this subject), and hide responsibility. Unless it refers to something earlier, write around "it is." Likewise, beware its cousins, "There is" and "There are."

Keep lists parallel. When you create a list, stick to one pattern. By avoiding interruptions, you set up expectations that make reading easy. Violations of parallelism occur most often when writers mix things and action, statements and questions, or active and passive instructions.

RULES OF ENGAGEMENT

Possession is nine-tenths of the apostrophe.

1. The possessive case of a singular or plural noun not ending in "s" is formed by adding an apostrophe and "s." The possessive case of a singular or plural noun ending in "s" or with an "s" sound is formed by adding an apostrophe only. E.g., men's, Schultz', Joneses'.
2. In compound nouns, the 's is added to the element nearest the object possessed, e.g., Judge Advocate General's office, John Canham, Jr.'s lecture notes.
3. Joint possession is indicated by placing an apostrophe on the last element of a series, but individual or alternative possession requires the use of an apostrophe on each element of a series. E.g., soldier and sailor's home, Carter's or Reagan's Administration.
4. Possessive nouns do not take an apostrophe, e.g., ours, its, theirs.
5. The singular possessive case is used in such general terms as "arm's length," "attorney's fees," and "writer's cramp."
6. In addition to illustrating possession, the apostrophe is used to indicate contractions, the omission of figures or letters, and the coined plural of letters, figures, and symbols. E.g., don't, class of '78, the 1920's, SSBN's, RIF'd, MC'ing.
7. The possessive case is often used in lieu of an objective phrase even though ownership is not involved. E.g., one month's pay, three years' confinement, a stone's throw from the brig.
8. For euphony, nouns ending in "s" or "ce" and followed by a word beginning with "s" form the possessive by adding an apostrophe only. E.g., for goodness' sake.
9. A possessive noun used in an adjective sense requires the addition of 's. E.g., He

is a friend of John's.

10. A noun preceding a gerund should be in the possessive case. E.g., In the event of Mary's leaving.

9306

LESSON FIVE

QUOTE FOR THE WEEK

"There are days when the result is so bad that no fewer than five revisions are required. In contrast, when I'm greatly inspired, only four revisions are needed."

John Kenneth Galbraith

CO's CORNER

Be direct! Write in short declarative sentences--subject, verb, object. Avoid the use of lengthy (and potentially confusing) dependent clauses. Convert independent clauses into sentences.

Observe the chain of command and make it apparent on the face of the document that you have done so. One way is to have a "chop chain" on the document. However, to avoid unnecessary delay or interference with your recommendation, you can "shorten" the chain by saying, for example: "I've discussed this with the XO, and he agrees."

LESSON

Subject-Verb and Gaps

- Subject-Verb

As a general rule, figure out what you are trying to say, and place your main message at the subject-verb position in the sentence. Exceptions to the rule can create spice in your writing. For example:

These are the times that try men's souls.

This has a much nicer ring than would result from following the rule:

These times try men's souls.

or

In these times, men's souls are tried.

Your message receives the most emphasis when placed at the end of the sentence. The second most emphatic position is at the beginning of the sentence. Inverting the order of a sentence changes the emphasis. For example:

The right to vote is essential to our liberty.

vice

Essential to our liberty is the right to vote.

- Gaps

If the subject-verb combination contains the main message, you should avoid writing that separates one from the other. In other words, avoid gaps like those in the following examples.

This office, after a thorough review of its policies and procedures, a complete consideration of the ramifications of this decision, and an assessment of the performance which you have made from the commencement of your employment to the present time, has made the determination that your services will no longer be needed. (Between subject and verb)

The Board of Directors has decided to surrender, without admitting any responsibility in this matter and with no intent to establish this decision as any kind of precedent for the future, its rights under the insurance policy. (Between the verb and its object)

You should, in order to make your writing clear, avoid gaps. (Between parts of a complex verb)

STYLE THOUGHTS

Strive for seasoned perspective. Exaggeration weakens the author's credibility. True crises come infrequently; few actions are outrageous; economies are seldom paralyzed for long. Few things are urgent; fewer still are vital. To get the size of the crowd, divide the newspaper estimate by 3.1416.

The hyphenation of compound words is troublesome. As Fowler states: "[N]o two dictionaries and no two sets of style rules would be found to give consistently the same advice." Consult the GPO Style Manual. When in doubt, be mindful of Fowler's general rule: "[T]he hyphen is not an ornament but an aid to being understood and should be employed only when it is needed for that purpose."

Avoid the use of legalese. Terms such as "therein," "herewith," and "the undersigned" sound pompous and do not give the writing added authority. Try "there," "here," and "I."

RULES OF ENGAGEMENT

Ten basic rules for the use of the comma.

1. Use commas to separate items in a series. The use of a comma after the next to last item is preferred.

He has hunted in Alaska, Montana, and Pennsylvania.

2. Use a comma before a coordinating conjunction (and, but, or, nor, for, so, and yet) that joins two independent clauses.

The study guides arrived on schedule, but were badly damaged in transit.

3. Place a comma after a verbal phrase (i.e., an infinitive or participial phrase that is often introductory) used as a modifier.

Before entering the building, the Lieutenant stopped to shine his shoes.

4. Use commas to separate the items in a date or an address.

We met on September 6, 1989, in Newport, Rhode Island.

But: We left in October 1990. Send the letter to me at NJS, NETC, Newport, RI 02841.

5. Place a comma after an introductory (often adverbial) clause.

If he had studied more, he would have done better on exams.

6. Use commas to set off nonrestrictive phrases and clauses.

Captain Smith, who once worked in Washington, will be our new commanding officer.

7. Use commas to set off parenthetical expressions, or expressions that interrupt.

There are, I am told, four instructors in operational law.

8. Use commas to set off words that are independent of a main clause or are clearly nonrestrictive.

The project, Mr. Hayes, may take a week or more. No, it cannot be completed in two days.

9. Use commas when they are needed simply to prevent misreading.

Without Mary, Thomas may be unable to complete the project.

10. Use commas when they are needed to secure emphasis.

The letter of commendation was, belatedly, sent to his next command.

9307

LESSON SIX

QUOTE FOR THE WEEK

"I can't write five words but that I change seven."
Dorothy Parker

CO's CORNER

Do not use footnotes when writing to a line officer. Avoid them even when writing to lawyers. Footnotes derail the reader's train of thought. The part of your brain that produces footnotes should have been buried in a brief ceremony immediately following law school graduation. Consider parentheticals in the text as an alternative.

LESSON

Nouniness

The indispensable word in the English language is the verb. Writers often tend to transform verbs into derivative nouns or derivative adjectives, causing the reader to grope for the verb, as in the following examples.

The commission should make a statement as to the history of this procedure.

From the facts submitted in your report, the FOIA office might draw the inference that you are on a fishing expedition.

The Board is hopeful of an early resolution of this issue.

The Board is in agreement with the position of the President.

Look for nouns ending in -ment, -ion, -ance, -ancy, and -ency.

Look for adjectives ending in -ful, -ant, -ent, and -able.

By eliminating nouniness and writing with verbs, the above examples have more action, more punch.

The commission should state the history of this procedure.

From the facts submitted in your report, the FOIA office might infer that you are on a fishing expedition.

The Board hopes to resolve this issue soon.

The Board agrees with the position of the President.

A special note on "there are," "there is," "it is," and "this is" followed by a dependent "that" clause. Nine times out of ten, you should zap the "there is" construction, look within the clause, and find and use the word that ought to be the subject of the sentence.

Example

Improper: It is the belief of the Board that this policy is an impediment to successful completion of the project.

Proper: The Board believes this policy impedes successful completion of the project.
Or: The Board believes this policy hurts the project's chances for success.

STYLE THOUGHTS

According to Carl Sandburg, adverbs are better tools than adjectives because they enhance the verb and are active. Adjectives simply load down the noun.

Verbs make language live. The verb is the operative word; it gives the sentence meaning. Strength in sentence structure comes from emphasis on the verb.

Avoid "hut-2-3-4" phrases, i.e., long freight trains of nouns and modifiers. Readers miss what modifies what and have little idea when the train will end.

Avoid excessive underlining for emphasis. Your sentence structure should provide all the emphasis you need. If you underline too often, you dilute the value of the tool. Save it for when it really counts.

RULES OF ENGAGEMENT

Know how to use your colon!

1. Use a colon before a final clause that extends or amplifies preceding matter. E.g., Give up conveniences; do not demand special privileges; do not stop work: these are necessary while we are at war.
2. Use a colon to introduce formally any matter that forms a complete sentence, question, or quotation. E.g., The following question came up for discussion: What is the mission of this command?

3. Use a colon after introductory lines in lists and tables if subentries follow.
4. Use a colon in Biblical citations. e.g., Luke 4:3.
5. Use a colon to separate book titles and subtitles. E.g., "Up in the Air: The Legislative History of the Infield Fly Rule."

A POCKET LIBRARY FOR GOOD WRITING

The Elements of Style, by William Strunk, Jr., and E. B. White, MacMillan, 1979.

Contemporary Writing, by Michael Adelstein, Random House, 1971.

English 3200: A Programmed Course in Grammar and Usage, second edition, by Joseph C. Blumenthal, Harcourt Brace Jovanovich, 1972.

Handbook of Technical Writing, by Charles T. Brusaw, Gerald J. Alred, and Walter E. Oliu, St. Martin's Press, 1976.

A Dictionary of Modern English Usage, Second Edition, by H. W. Fowler, Oxford University Press, 1965.

Harper Dictionary of Contemporary Usage, William and Mary Morris, Harper and Row, 1975.

The Armed Forces Officer, NAVMC 2563 (Rev. 1988), Chapter 12.

9308

LESSON SEVEN

QUOTE FOR THE WEEK

"When I stepped from hard manual labor work to writing, I just stepped from one kind of hard work to another."

Sean O'Casey

CO's CORNER

Don't make the decision look harder than it is! Always ask as you write: Do I really need to say this? Or, will it introduce unnecessary considerations into the discussion/ decisional process? (Self-inflicted wounds are the worst kind.)

Work hard to make your point well just one time--and then stop. Repeating it two or three times in slightly different ways runs the risk of confusing the reader.

LESSON

Compound Prepositions and "The Fact That"

- Compound Prepositions

A compound preposition is two or more prepositional phrases strung together. Look for a single word meaning the same thing and use it instead.

CompoundSimple

at that point in time	then
at this point in time	now
during the course of	during
in accordance with	by, under, per
in favor of	for
in order to	to
in relation to	about, concerning
prior to	before
subsequent to	after
with respect to	on, about

This is just a partial list of ways to make your writing shorter, simpler, better. Consider Chapter 1 of the DON Correspondence Manual (SECNAVINST 5216.5C).

Section F of that Chapter has a long list of simpler words and phrases, including the "dirty dozen."

- "The Fact That"

When the clause is necessary, simply eliminate "the fact."

Example: The Board pointed out the fact that the employee was drunk.

Changed: The Board pointed out that the employee was drunk.

When the clause is unnecessary and the verb of the clause is not the verb "to be," look inside the "the fact that" clause, find the verb, and convert the verb form to a noun form.

Example: The Board emphasized the fact that the employee failed to claim discrimination.

Changed: The Board emphasized the employee's failure to claim discrimination.

When the clause is unnecessary and the verb of the clause is the verb "to be," look inside the "the fact that" clause, find the predicate adjective, and convert it to the noun form.

Example: The Board emphasized the fact that the plaintiff was negligent.

Changed: The Board emphasized the plaintiff's negligence.

STYLE THOUGHTS

Once you've written a draft, read it aloud. Style depends in part on the cadence of your prose. Listen to your copy with a fine-tuned ear. In the prose that pleases, you find that every sentence has an unobtrusive rhythm that propels it on its way. The art is to make the reader *forget they are reading*. If you wouldn't say it in person, don't say it in the mail. Take time to revise. For most of us, good writing really means good rewriting. It's worth the effort. A single naval letter is likely to be read by many people as it goes up for signature in one activity and down for action in another. Work to help the many who must read your writing. If you don't sweat, your readers will.

RULES OF ENGAGEMENT

The semicolon, the colon's tricky friend.

1. The semicolon is used to separate clauses containing commas. E.g., No; sir; I do not recall.
2. The semicolon is used to separate statements that are too closely related in meaning to be written as separate sentences. E.g., No; we received three books.
3. The semicolon is used to separate statements of contrast. E.g., War is destructive; peace, constructive.
4. The semicolon is used to set off explanatory abbreviations or words which summarize or explain preceding matter. E.g., Three Marines were involved in the affray; namely Private Lawler, Corporal Thomas, and Sergeant Markosky.
5. The semicolon is not used where a comma will suffice. E.g., Regional offices are located in New York, NY, Chicago, IL, and Dallas, TX.

9309

LESSON EIGHT

QUOTE FOR THE WEEK

"Anything that is written to please the author is worthless."

Blaise Pascal

"The most essential gift for a good writer is a built-in shock-proof shit detector."

Ernest Hemingway

CO's CORNER

Don't be subtle unless you are making a subtle point. Otherwise, you make the point appear more difficult than it really is. Remember what is important and what is not! Busy professionals recall only a small percentage of what they read. Always apply this test: If the reader is going to remember just one or two things I've said, what do those points have to be?

LESSON

Active v. Passive Voice

Active voice defined. In the active voice, the subject of the sentence is the actor. The direct object of the sentence is the recipient of the action. Notice that the action flows from the left to the right.

The legislative history supports our interpretation.

The boy hit the ball.

The Board set the policy.

The hearing officer has excluded the press.

Passive voice defined. In the passive voice, the direct object of the sentence is the actor. The subject of the sentence is the recipient of the action. The subject, then, is passive. It sits there and "takes it" from the direct object. Notice that the action flows from left to right.

Our interpretation is supported by the legislative history.

The ball was hit by the boy.

The policy was set by the Board.

The press has been excluded by the hearing officer.

The active voice is generally preferred. The passive voice is "mushy" and lacks punch. In addition, it takes more words to say the same thing in the passive voice.

Below are the seven situations in which the passive voice is preferred.

1. When you are generalizing and you want to avoid using "one" as the subject of the sentence.

Passive: Here are the seven situations where the passive voice is preferred.

Active: Here are seven situations where one prefers the passive voice.

2. When the identity of the actor is the "punch" of the sentence, and you want to place it at the end.

Passive: The tapes were hidden by the President.

Active: The President hid the tapes.

3. When the identity of the actor is irrelevant (or well known), and you simply want to omit it.

Passive: The statute was enacted in 1968.

Active: Congress enacted the statute in 1968.

4. When the identity of the actor is unknown.

Passive: The files were mysteriously destroyed.

Active: Somebody mysteriously destroyed the files.

5. When you want to hide the identity of the actor.

Passive: I regret to inform you that your file has been misplaced.

Active: I regret to inform you that I misplaced your file.

6. When you want to avoid sexist writing and those horrible monsters: s(he), he/she, him/her, his/hers.

Passive: An application must be filed with the personnel office. A complete educational background should be included.

Active: An applicant for employment must file his/her application with the personnel office. He/she should include his/her complete educational background.

7. When the passive voice simply sounds better, i.e., tone.

Passive: Consumers are sometimes abused and exploited by a disreputable seller.

Active: A disreputable seller sometimes abuses and exploits consumers. (Too many ssss's!)

In all other situations, you should prefer the active voice.

STYLE THOUGHTS

"Which" or "That"? The distinction between these two words is a chronic stumbling block. "That" is used to introduce a defining or restrictive clause: "The lawn mower that is broken is in the garage; Arnold made a list of books that had influenced him." The "that" clause further identifies the thing or things referred to by limiting the scope of the antecedent: not lawn mowers generally, but the one in the garage; not books generally, but only the ones that influenced Arnold.

"Which" introduces a nondefining or nonrestrictive clause: "The lawn mower, which is broken, is in the garage; I always buy his books, which have influenced me greatly." Here, the "which" clauses do not limit their antecedents by restricting them to a particular class; the clauses merely add a fact about the lawn mower or books in question.

Respect plain words. Go out of your way to use them. "Issue" orders, don't "promulgate" them. "Start" something, don't "initiate" it. Effective writing is a tool to be "used," not "utilized."

RULES OF ENGAGEMENT

Alex, I think I'll try Quotable Quotes for \$100.

1. Quotation marks, oddly enough, are used to enclose direct quotations. Each part of an interrupted quotation begins and ends with quotation marks. E.g., "John," said Henry, "is the tallest in the class."

2. Quotation marks are used to enclose any matter following such terms as entitled, the word, the term, marked, designated, classified, named, endorsed, cited as, referred to as, or signed; but not used to enclose expressions following the terms known as, called, so-called, etc., unless the expression is a misnomer or slang. E.g., The check was signed "Walter Burton."
3. Quotation marks are used to enclose titles of articles, books, captions, headlines, motion pictures, plays, songs, etc., and the principal words inside are capitalized. E.g., We went to see "The Terminator" at Cannes.
4. Use quotation marks at the beginning of each paragraph of a quotation, but only at the end of the last paragraph.
5. Use quotation marks to enclose misnomers, slang, nicknames, coined words, or ordinary words used in an arbitrary way. E.g., The sailor was tried for distribution of "crack."
6. Quotation marks are not used to enclose: titles of works of art; the names of periodicals; or extracts that are indented (i.e., of 50 or more words).

9310

CONCLUSION

The proliferation of computer-managed command and control systems, automated reporting and accounting systems, and other mechanical aids to the management and command of military forces fails to diminish the need for excellence in written and oral communications. Once officers understand that clear, concise articulation of orders, information, and directives is a basic qualification, the exceptional officer will accept the corollary: Superior qualification in the use of the written and spoken word is as essential to military leadership as the knowledge of the whole technique of weapons handling and the use of complex systems.

It then becomes a matter of personal decision whether the officer will develop the communications skills necessary for exceptional leadership or will hide behind the excuse offered by too many, "I have no gift for writing or speaking."

Churchill had a "gift" of forceful expression, as did MacArthur. In both cases, the "gift" was the direct result of mastering the language and years of dedicated practicing and rewriting. Both of these masters of the written word had something to say. It was based on their study of great ideas by other masters of the language. Both were familiar with the ideas that control the destiny of man and nations. They also incorporated into their writing the techniques that had been used effectively to present these ideas.

Continue to work on improving your writing. Strive for excellence in every document you create. Keep this program as a reference, and review it periodically. Consult the attached reading list for additional tips on how to write well. And remember Mark Twain's admonition: "Never let your schooling interfere with your education."

ACRONYMS

ACDA	U.S. Arms Control and Disarmament Agency
ACMR	Army Court of Military Review
AFCMR	Air Force Court of Military Review
AECA	Arms Export Control Act
AFDCB	Armed Forces Disciplinary Control Board
AMIR	Aircraft Mishap Investigation Report
ASW	Antisubmarine Warfare
BCNR	Board for the Correction of Naval Records
CA	Convening Authority
CAP	Crisis Action Procedures
CIA	Central Intelligence Agency
CJCS	Chairman of the Joint Chiefs of Staff
CMA	Court of Military Appeals
CMC	Commandant of the Marine Corps
CMO	Court-Martial Order
CNO	Chief of Naval Operations
CNP	Chief of Naval Personnel
CO	Commanding Officer, Conscientious Objector
CONUS	Continental United States
CPD	Congressional Presentation Document
CRAF	Civil Reserve Air Fleet
CRITIC	Critical Intelligence Report
CY	Current Year
DES	Disability Evaluation System
DCA	Defense Communications Agency

DCID	Director of Central Intelligence Directive
DIA	Defense Intelligence Agency
DLA	Defense Logistics Agency
DoD	Department of Defense
DODIC	DOD Identification Code
DoE	Department of Energy
DoJ	Department of Justice
DoN	Department of the Navy
DOPMA	Defense Officer Personnel Management Act
DoT	Department of Transportation
DSAA	Defense Security Assistance Agency
DTG	Date-Time Group
EAOS	Expiration of Active Obligated Service
ECCM	Electronic Counter-Countermeasure
ECM	Electronic Countermeasure
EDA	Excess Defense Articles (EDA) Program
EEO	Equal Employment Opportunity
ELAP	Expanded Legal Assistance Program
ELS	Entry Level Separation
EMI	Extra Military Instruction
EPW	Enemy Prisoner of War
ESF	The Economic Support Fund
ESG	Executive Steering Group
FAA	Foreign Assistance Act
FCA	Foreign Claims Act
FCCA	Federal Claims Collection Act
FECA	Federal Employees Claims Act

FFB	Federal Financing Bank
FISA	Foreign Intelligence Surveillance Act
FM	Field Manual, or Force Module
FMFM	Fleet Marine Force Manual
FMFP	Foreign Military Financing Program
FMS	Foreign Military Sales
FMCS	Foreign Military Construction Sales
FOIA	Freedom of Information Act
FRCP	Federal Rule of Civil Procedure
FTCA	Federal Tort Claims Act
FY	Fiscal Year
GAO	General Accounting Office
GCM	General Court Martial
GCMA	General Court Martial Convening Authority
GEN	General Discharge
HIV	Human Immunodeficiency Virus
HTLV	Human T-Lymphotropic Virus
HON	Honorable Discharge
HQMC	Headquarters, U.S. Marine Corps
ICAO	International Civil Aviation Organization
ICR	Intelligence Collection Requirement
IDA	Initial Denial Authority
IG	Inspector General
IHCA	In the Hands of Civil Authorities
IMC	Individual Military Counsel
IMET	International Military Education and Training Program
INFOSEC	Information Security

IO	Investigating Officer
IRC	Internal Revenue Code
IRO	Initial Review Officer
JAG	Judge Advocate General
JAR	Research and Policy Branch
JCS	Joint Chiefs of Staff
JOFS	Joint Operation Planning System
JSCP	Joint Strategic Capabilities Plan
LMET	Leadership, Management Education and Training
LOAC	Law of Armed Conflict
LOI	Letter of Instruction
LONO	Law of Naval Operations
MAP	Military Assistance Program
MAW	Marine Air Wing
MCA	Military Claims Act
MCCP	Marine Corps Capabilities Plan
MCM	Manual for Courts-Martial; Marine Corps Manual
MCO	Marine Corps Order
MCRA	Medical Care Recovery Act
MCSF	Marine Corps Security Force
MEB	Marine Expeditionary Brigade
MEF	Marine Expeditionary Force
MEU	Marine Expeditionary Unit
MFO	Multinational Force and Observers
MJ	Military Judge
MLSR	Missing, Lost, Stolen or Recovered property report
MOP	Memorandum Of Policy (JCS)

MoU	Memorandum of Understanding
MPS	Maritime Pre-positioning Ships
M&RA	Manpower and Reserve Affairs
MRE	Military Rule of Evidence
MSC	Military Sealift Command
MSPB	Merit System Protection Board
MWR	Morale, Welfare, and Recreation
NAFI	Non-Appropriated Fund Instrumentality
NATO	North Atlantic Treaty Organization
NBC	Nuclear, Biological, and Chemical
NCA	National Command Authorities
NCMP	Navy Capabilities and Mobilization Plan
NCO	Noncommissioned Officer
NCPC	Navy Civilian Personnel Command
NDA	National Defense Area
NDRB	Navy Discharge Review Board
NJP	Non-Judicial Punishment
NMCMR	Navy Marine Corps Court of Military Review
NOE	Notice of Eligibility
NOFORN	Not Releasable to Foreign Nationals
NPLOC	Non-Punitive Letter of Caution
NSA	National Security Agency
NSC	National Security Council
NSCID	National Security Council Intelligence Directive
NSDD	National Security Decision Directive
NSP	Navy Support Plan
OAS	Organization of American States

OGC	Office of the General Counsel
OIC	Officer in Charge
OJAG	Office of the Judge Advocate General
OLA	Office of Legislative Affairs
OMB	Office of Management and Budget
OPCON	Operational Control
OPLAN	Operational Plan in complete format
OPORD	Operation Order
ORF	Official Representation Funds
OSC	Office of Special Counsel
OSD	Office of the Secretary of Defense
OSHA	Occupational Safety and Health Act
OTH	Other Than Honorable Discharge
PAO	Public Affairs Office
PCA	Posse Comitatus Act; Personnel Claims Act
PEB	Physical Evaluation Board
PERSEC	Personnel Security
PKO	Peacekeeping Operations
POA	Power of Attorney
POL	Petroleum, Oils, and Lubricants
POW/PW	Prisoner of War
PPBS	Planning, Programming, and Budgeting System
PWRMR	Pre-positioned War Reserve Material Requirement
PWRMS	Pre-positioned War Reserve Material Stocks
PWRS	Pre-positioned War Reserve Stocks
QIOR	Quarterly Intelligence Oversight Report
R&D	Research and Development

RDF	Rapid Deployment Force
RDT&E	Research, Development, Test, and Evaluation
ROE	Roles of Engagement
RRF	Ready Reserve Fleet
R&P	Record Review Panel
SAMM	Security Assistance Management Manual
SAR	Search and Rescue
SAUSA	Special Assistant U.S. Attorney
SDAF	Special Defense Acquisition Fund
SDDM	Secretary of Defense Decision Memorandum
SEAL	Sea/Air/Land
SERE	Survival, Evasion, Resistance, and Escape
SOC	Special Operations Command
SOFA	Status of Forces Agreement
SOP	Standing Operating Procedure
SPCM	Special Court-Martial
SPCMA	Special Court-Martial Convening Authority
SCM	Summary Court-Martial
SECDEF	Secretary of Defense
SECNAV	Secretary of the Navy
SJA	Staff Judge Advocate
SSCRA	Soldiers' and Sailors' Civil Relief Act
TDRL	Temporary Disability Retired List
TO	Table of Organization
TOE	Table of Organization and Equipment
TQL	Total Quality Leadership
TSCM	Technical Surveillance Counter Measures

UCMJ	Uniform Code of Military Justice
UIC	Unit Identification Code
UN	United Nations
UNCITRAL	U.N. Commission on International Trade Law
UNFICYP	United Nations Force in Cyprus
UNIDROIT	International Institute for the Unification of Private Law
USCENTCOM	United States Central Command
USCINCCENT	Commander in Chief, U.S. Central Command
USCINCEUR	Commander in Chief, U.S. European Command
USCINCLANT	Commander in Chief, U.S. Atlantic Command
USCINCPAC	Commander in Chief, U.S. Pacific Command
USCINCSO	Commander in Chief, U.S. Southern Command
USCINCSOCOM	Commander in Chief, U.S. Special Operations Command
USCINCSpace	Commander in Chief, U.S. Space Command
USCINCTrans	Commander in Chief, U.S. Transportation Command
USEUCOM	United States European Command
USFJ	United States Forces Japan
USFK	United States Forces Korea
USIA	U.S. Information Agency
USLANTCOM	United States Atlantic Command
USPACOM	United States Pacific Command
USSOUTHCOM	United States Southern Command
USSOCOM	United States Special Operations Command

USSPACECOM	United States Space Command
USTRANSCOM	United States Transportation Command
USTC	United States Transportation Command
VA	Veterans' Administration
VRRA	Veterans' Reemployment Rights Act
WWMCCS	Worldwide Military Command and Control System
XO	Executive Officer

